Administrative Law Section Newsletter

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Cottage Industry Or Not, Attorney's Fees Are Available

by Craig H. Smith

In 1996, the Florida Legislature amended Florida's Administrative Procedure Act (the "APA"), and in doing so, consolidated several attorney's fees provisions into §120.595. While parties to administrative actions were able to recover reasonable attorney's fees and costs prior to 1996, attorneys had to be mindful of the various sections of the APA that provided for such recovery.[1] However, thanks to the Florida Legislature, attorneys who prefer "one stop shopping" can now look primarily to §120.595 for the various grounds for recovery of attorney's fees.[2] This article will address some of the recent judicial and administrative decisions interpreting §120.595.

Despite one agency's arguments that the attorney's fees provision in §120.595(4) would create a "cottage industry" for administrative law practitioners, the First District Court of Appeal has held that attorney's fees *must* be awarded to prevailing parties under that section.[3] As a result, administrative law practitioners who are seeking to purchase that cottage on the water should become familiar with the sources of capital made available through §120.595.

Challenges to Agency Action Pursuant to §120.57(1)

Section 120.595(1) requires the administrative law judge (the "ALJ") to award reasonable attorney's fees and costs to the prevailing party in a formal administrative hearing held pursuant to §120.57(1) if the ALJ determines that the nonprevailing adverse party participated in the proceeding for an improper purpose.[4] Although the statute only provides for "reasonable" attorney's fees and costs, it places no limits on the amount that may be deemed reasonable.

The statute contains a definition

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From the Chair ...

Increased "Formalization" of APA Disserves Citizens

by M. Catherine Lannon

Sometimes I wonder if we aren't losing sight of the underlying purpose of the APA. I always thought, and think, that one of the goals of the APA was to give people access to government agencies. It was to provide a procedure and process that an ordinary citizen could understand and follow when his or her substantial interests are affected by government action.

I recall that several years ago there was a proposal to make Administrative Law an area for certification. It was soundly rejected on the basis that individuals should not need to have an attorney in order to be heard by an agency, let alone an attorney who was certified.

Over the last 25 years however, the APA has been transformed from an open avenue for interaction between affected citizens and their government into an obstacle course that almost requires the guidance of qualified legal counsel to be successfully navigated. For an example, I call your attention to Chapter 98-200, Laws of Florida. This new law requires a formality and detail of pleading for petitions for administrative hearings that is extensive and rigid. Each petition *must* state how the petitioner

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of "improper purpose," but it also adopts the definition as it appears in §120.569(2)(c).[5] Further, §120.595(1)(c) creates a rebuttable presumption that the nonprevailing party participated in the proceeding for an improper purpose if all of the following conditions are satisfied: (i) the nonprevailing party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party; (ii) the nonprevailing adverse party failed to establish either the factual or legal merits of its position in the two prior proceedings; and (iii) the factual or legal merits of the nonprevailing party's position asserted in the instant proceeding would have been cognizable in the previous proceedings.[6] Attorneys should be aware of this powerful "three strikes" provision when participating in administrative actions.

Section 120.595(1)(e)(3) defines the term "nonprevailing adverse party" to mean "a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding."[7] Section 120.595(1)(e)3 contains an interesting provision that states "in no event shall the term 'nonprevailing party' or 'prevailing party' be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency."[8] Thus, it appears that a party that has intervened to support an agency position cannot be assessed attorney's fees and costs under §120.595(1) for participating for an improper purpose.[9] However, there appears to be no limitation on a party's ability to seek attorney's fees against an intervenor that is not participating to support an agency's position.[10]

The availability of attorney's fees under §120.595(1) was addressed *Perdue v. T.J. Palm Associates, Ltd.*, 1998 Fla. ENV LEXIS 93 (January 15, 1998). In *Perdue*, the petitioner filed its petition to challenge the South Florida Water Management District's (the "SFWMD") issuance of Environmental Resource Permits to the respondent. After the formal hearing, the ALJ concluded that "the evidence reveals that Petitioner's initiation of this proceeding by filing a challenge to T.J.'s construction permit was merely a thinly-disguised attempt to challenge in an untimely manner T.J.'s conceptual approval permit when Petitioner knew she had knowingly and voluntarily failed to timely challenge the permit."[11] Although the SFWMD noted in its Final Order that it was concerned about the "chilling effect" that an award of attorney's fees might have on legitimate citizen participation in agency proceedings, the SFWMD found no basis for rejecting the ALJ's finding of fact regarding the petitioner's initiation of the administrative proceeding. However, because the record contained no evidence as to the reasonable amount of attorney's fees to be awarded, the SFWMD remanded the matter back to the ALJ for an evidentiary hearing to determine the reasonable amount of attorney's fees.

In *Greenspace Preservation Association, Inc. v. City of Gainesville*, the ALJ ruled that attorney's fees were not warranted because the petitioners did not participate in the proceeding for an improper purpose as that term is defined in §120.595(1)(e)3.[12] In *Greenspace*, the petitioners were homeowners who petitioned to prevent the City of Gainesville from obtaining a stormwater system management permit (stormwater permit) and a general environmental resource permit. The ALJ ruled in favor of the City of Gainesville but ruled that the petitioners should not be assessed attorney's fees under the "improper purpose" standard despite the fact that the petitioners (i) did not consult with experts prior to filing their petitions, (ii) did not prepare any scientific investigations, (iii) did not retain any experts until just prior to the hearing, and (iv) had filed their petitions based on concerns that they either failed to substantiate or that were irrelevant to the permitting criteria. Because the ALJ believed that the citizens had genuine concerns with the project, the ALJ concluded that the petitions were filed in good faith and not for the purpose of delaying the issuance of the permits or needlessly increasing the City's costs in securing the permits.

Challenges to Proposed Agency Rules Pursuant to Section 120.56(2).

Section 120.595(2) requires an ALJ to award attorney's fees to the prevailing party in an action where the ALJ declares a proposed rule or a portion of the proposed rule invalid pursuant to §120.56(2), unless the agency demonstrates that its actions were "substantially justified" or that special circumstances exist that would make the award unjust.[13] This section defines "substantially justified" to mean that there existed a reasonable basis in law and fact at the time the actions were taken by the agency.[14] This section also allows the ALJ to award the prevailing agency attorney's fees the ALJ determines that the opposing party participated in the proceeding for an improper purpose.[15] Unlike §120.595(1), this section limits the award of attorney's fees to $15,000.[16] Thus, this section may not offer the best method of obtaining the down payment for that new cottage.

In *Environmental Trust v. Dept. of Environmental Protection*, the First DCA reversed an award of attorney's fees assessed pursuant to

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§120.595(2) by the ALJ against the Department because the court found that the Department's proposed rule was valid and could be applied retroactively against the appellants.[17] In *Environmental Trust*, the Department issued a non-rule policy memorandum that, when applied retroactively, adversely affected petitioners' interests. The Department later proposed the policy as a rule. The petitioners sued the Department to determine the validity of the proposed rule, and the ALJ concluded that the proposed rule was invalid and could not be applied retroactively.[18] After declaring the proposed rule invalid, the ALJ ruled that the petitioners were entitled to attorney's fees pursuant to §120.595(2).

The First DCA reversed and held that the rule did not establish new policies but instead merely clarified existing policies. Therefore, the rule as adopted was valid and could be applied retroactively. Not only did the petitioners lose the battle, they lost the war because the First DCA reversed the award of attorney's fees under §120.595(2) because the proposed rule was not invalid. By reversing the award of attorney's fees, the First DCA did not need to address whether the Department's actions were "substantially justified" such that attorney's fees should not have been awarded.

Challenges to Existing Agency Rules Pursuant to Section 120.56(3)

Section 120.595(3) states that if the court or an ALJ declares a portion of an existing rule invalid pursuant to §120.56(3), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or that special circumstances exist which would make the award unjust.[19] As with §120.595(2), an agency may recover attorney's fees if the party opposing a rule is found to have participated for an improper purpose. Finally, §120.595(3) also limits the amount of attorney's fees that may be recovered to $15,000.[20]

In *Lakeland Memorial Gardens, Inc. v. Dept. of Banking and Finance*, the ALJ found certain rules promulgated by the Department to be invalid.[21] However, that conclusion was not the only good news for the petitioner. In the Final Order, the ALJ stated that DOAH would retain jurisdiction "to determine the issue of attorneys' fees under Section 120.595(3), Florida Statutes, *upon proper motion*."[22] Thus, a party deserving attorney's fees may be fortunate enough to be before an ALJ who will remind him or her that such fees are available.

Challenges to Agency Action Pursuant to Section 120.56(4)

Section 120.595(4) states that the ALJ *shall* award reasonable attorney's fees and costs if an agency statement is found to be a rule that the agency failed to adopt through the statutory rulemaking procedure.[23] This section does not limit the amount of attorney's fees that may be deemed reasonable, but it does state that the award shall be paid from the budget entity of the head of the agency.

In *Security Mutual Life Ins. v. Dept. of Insurance*, the First DCA held that §120.595(4) mandates an award of reasonable attorney's fees if an agency's statement is found to constitute a rule that was not properly adopted.[24] In *Security Mutual*, the Department argued against mandatory attorney's fees by claiming that such a result would found a cottage industry for administrative law practitioners. The First DCA stated that whether or not a "cottage industry" will arise, "and whether or not that proves desirable," it was bound to apply the statute as written.[25] As one commentator has stated, "Ladies and gentlemen, start your engines."[26]

Appeals

Section 120.595(5) provides an appellate court with discretion to award reasonable attorney's fees and costs if it determines that a party's appeal was "frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion."[27] This section also provides for mandatory attorney's fees if the court finds that an agency improperly rejected or modified an ALJ's findings of fact in a recommended order. The First DCA has held that a frivolous appeal is not merely one that is likely to be unsuccessful. Rather, the court stated the following with respect to a frivolous appeal:

> It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error [or briefs, in keeping with modern practice], that its character may be determined without argument or research.[28]

Notwithstanding this lofty standard (or sordid standard, whichever one prefers), the First DCA in *Life Care Centers v. Health Care and Retirment Corp.* expressed no difficulty in assessing attorney's fees against the appellant Life Care for what the First DCA considered to be a frivolous appeal.[29] According to the First DCA, the ALJ's recommended order adopted by the agency spanned 86 pages and was based on eleven volumes of transcripts and numerous exhibits. However, Life Care's appeal, which was based on the weight of the evidence, failed to cite any evidence that supported its three claims of error. Concluding that the appeal was frivolous and without merit, the First DCA remanded the matter to DOAH for a determination of the amount of fees and costs.[30]

Conclusion

The consolidation of various attorney's fees provisions into §120.595 should assist administrative law practitioners with their research and with their collections process. However, given the standards for terms such as "improper purpose" and "frivolous," it is not easy for such practitioners to succeed on their motions for fees and costs. Although tribunals must assess reasonable fees and costs against agencies that propose or maintain invalid rules, the fees and costs are limited to $15,000. Finally, agencies that fail to follow proper rulemaking procedures face mandatory assessments of reasonable fees and costs without any limits on what may be redeemable.

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Case Notes, Cases Noted and Notable Cases

by Seann M. Frazier

District Courts of Appeal

First District

A long awaited decision was published on July 29, 1998 by the First District in the case of *St. Johns River Water Management District v. Consolidated — Tomoka Land Co.*, 23 Fla. L. Weekly D1787 (Fla. 1st DCA 1998). The case involved an appeal from an ALJ's Order that declared a series of proposed rules invalid. The Court would reverse and find the rules valid. Also released the same day was the First District's decision in *Department of Business and Professional Regulation v. Calder Race Course, Inc.* 23 Fla. L. Weekly D1795 (Fla. 1st DCA 1998), applying the standard announced in *Consolidated-Tomoka* to affirm the invalidation of proposed rules. Both cases are discussed in a feature article in this newsletter.

A rift developed between a psychologist and his hospital professional staff organization (PSO) in *Reiff v. Northeast Florida State Hospital*, 23 Fla. L. Weekly D1312 (Fla. 1st DCA 1998). The psychologist brought a rule challenge in order to argue that bylaws adopted by that PSO were unpromulgated rules. The bylaws restricted the duties of psychologists, such as Dr. Reiff, more than other physicians. The state hospital met the definition of an agency, and an administrative law judge found that the bylaws met the general definition of a rule. The ALJ also found, however, that Dr. Reiff lacked standing and that the bylaws met the "internal memoranda" exception to the definition of a rule. Section 120.52(16)(a), Fla. Stat. (1995) (now 120.52(15)). The First District disagreed.

The Court prescribed standing to Dr. Reiff after noting that an adverse effect on an economic benefit, apparently the test used by the ALJ, had never been considered the Rorschach test for standing. Rather, the fact that the rule would regulate Dr. Reiff was alone sufficient to establish that his substantial interests would be affected. *Coalition of Mental Health Professions v. Department of Professional Regulation*, 546 So.2d 27 (Fla. 1st DCA 1989).

The Court also disagreed with the ALJ's conclusion that the bylaws met the internal memoranda exception to the definition of rules. That exception is met by either showing that the memorandum does not affect the private interests of a person or that it does not affect the interests of the public. The Court found that the rules affected the doctor's private interests by limiting his clinical privileges. See *Florida State University v. Dann*, 400 So.2d 1304 (Fla. 1st DCA 1981). In testing whether the bylaws affected the pubic interest, the ALJ concluded that the public was unaffected because the bylaws had no application outside the agency (hospital). The Court did not adopt this reasoning. Instead, it looked to Florida law which prohibited discrimination in the award of clinical privileges and concluded that the issue was of public importance. These statutory prohibitions were evidence "appropriate in form" to the nature of the issues involved. *Florida League of Cities, Inc. v. Department of Environmental Reg.*, 603 So.2d 1363, 1370 (Fla. 1st DCA 1992).

In dissent, Judge Benton suggested that the "internal management memoranda" exception was met because the bylaws only applied to hospital (agency) employees.

* * *

In *South Miami Hospital, Inc. v. Agency for Health Care Administration*, 23 Fla. L. Weekly D1358 (Fla. 1st DCA 1998), an exception to an agency's rule was considered. The AHCA established a 15-bed minimum size for new neonatal units in hospitals. South Miami and a competitor filed applications for neo-natal units, though South Miami's proposal was for less than the 15-bed minimum size. After AHCA denied South Miami's application, South Miami sought formal administrative proceedings. However, the Agency denied that request. South Miami appealed from that order and the competitor intervened. While on appeal, the Agency and South Miami filed a "Joint Remand" motion which did not include consent from the competitor.

A majority found that AHCA's admission that it had previously accepted applications for less than the minimum size would support the remand. They noted the AHCA's wide discretion to interpret its rules. *Natelson v. Department of Insurance*, 454 So.2d 31 (Fla. 1st DCA 1984).

Judge Benton dissented because the competitor had become an appellee with full party status. Any "joint" motion which did not include the competitor lacked an indispensable party. In his view, the matter should have been fully briefed rather than short-circuited through remand.

* * *

A physician cannot be punished for charges not brought in an administrative complaint, can he? In *Ghani v. Department of Health*, 23 Fla. L. Weekly D1677 (Fla. 1st DCA 1998), the Agency did not clearly charge Dr. Ghani with the failure to arrange for ambulance transport of a patient. Nevertheless, an ALJ found that this was one ground for concluding a statutory standard of care had been violated. The First District read the plain language of the Complaint and could not find this allegation. *Cf. Sternberg v. Department of Prof'l. Reg., Bd. of Med. Exam'rs.*, 465 So. 2d 1324 (Fla. 1st DCA 1985). Neither would the Court uphold an additional allegation of substandard care because that conclusion lacked any evidence in the proceeding below. Diagnosis: reversed.

* * *

One must prove they are worth their salt in order to reap the benefits

of a disadvantaged business enterprise certification. In *Agricultural Land Services, Inc. v. State, Department of Transportation*, 23 Fla. L. Weekly D1490 (Fla. 1st DCA 1998), a "disadvantaged individual" owned a majority of a particular business and sought to have it certified as a DBE. Under the Department's rules, such an applicant must prove that that ownership is real and substantial by calculating and verifying the dollar value of expertise contributed by the disadvantaged owner, or that the disadvantaged owner had contributed capital which resulted in that ownership. An ALJ properly concluded that loans made by the individual to the company did not constitute capital contributions, but erred when concluding that the individual's expertise had been established. The Court on review found that the company failed to prove that the individual had proven her expertise was commensurate with her ownership interest.

* * *

Rules and their applicability were the subject of litigation in *Environmental Trust v. State, Dep't. of Envir'al. Prot., et al*, 23 Fla. L. Weekly, D134 (Fla. 1st DCA 1998). A trust fund managed by the Department encouraged restoration of polluted waters by offering reimbursement to private parties who performed cleanups. In several arrangements, companies organized investors, contractors and subcontractors to perform the work. In exchange, these organizers included a cost of discounting purchased accounts along to the Department as part of the reimbursement application. Additionally, general contractors who only performed site inspections, rather than integral management functions, included their own mark-up in the bills.

The Department had a rule requiring that only costs which are "integral to site rehabilitation" would be reimbursed. However, the rules did not specifically address the type of arrangement presented in these consolidated cases. Department officials issued memoranda and e-mail which explained that the Department should not pay for these discounts and site inspection mark-ups.

As these costs were disallowed, numerous Section 120.57(1) Fla. Stat. (1995) and Section 120.535, Fla. Stat. (1995) petitions were filed. They challenged the denial of reimbursement and the memoranda as unadopted rules. During a first set of consolidated proceedings, an ALJ found that the denial of payments was proper, but also found that the memoranda were unadopted rules. However, because the Department had initiated rulemaking as soon as feasible and practicable, the Section 120.535 petitions were dismissed as moot.

Separately, the rule which would have codified the memoranda was itself challenged in a Section 120.56 proceeding. In that proceeding, an ALJ found that the rule was invalid because it could not be applied retroactively (because the state created a vested right to reimbursement) and could not be applied prospectively (because the reimbursement program had since been eliminated). That ALJ also issued an award of costs and attorney's fees in the rule challenge proceedings pursuant to Section 120.595(2), Fla. Stat. (Supp. 1996) which allows for such an award when a rule is declared invalid.

The First District presented a comprehensive review of these consolidated appeals. First, it agreed that Florida Statutes did not create an entitlement to the discounts and mark-ups sought by appellants. Section 376.3071, Fla. Stat. (1995). The Court also found that this conclusion could be reached by simply reading the Department's rules which existed at the time of application for reimbursement (prohibiting reimbursement for "interest" or for work that was not "integral").

As to unadopted rules, the Court concluded that the existing rules may not have specifically contemplated this particular circumstance, but explanation of this particular circumstance was not itself a rule. Turning to the oft cited standard of "general applicability", the Court repeated that Agency statements which are the equivalent of rules must be tested and adopted in rulemaking (*Christo v. State, Department of Banking and Finance*, 649 So.2d 318 (Fla. 1st DCA 1995)), but not every Agency statement is a rule. The merits of particular interpretations are better served in Section 120.57 hearings. Moreover, the challenged memoranda and e-mails only interpreted existing rules rather than creating new, unadopted rules.

As to the new rule challenges, the Court noted that an administrative rule generally can only have prospective application. *Gulfstream Park v. Division of Pari-mutuel Wagering, Department of Business Reg.*, 407 So.2d 263 (Fla. 3rd DCA 1981). However, an exception applies when a new rule merely clarifies another existing rule and does not establish new requirements. See *Smiley v. City Bank of South Dakota*, 517 U.S. 735, 116 S.Ct. 1730, 135 L.Ed 2d 25 (1996). The Court adopted this federal exception and concluded that the newly proposed rules simply had this retroactive, interpretive effect. Thus, the order for attorney's fees was reversed because the rule was found valid.

Judge Benton dissented only to the extent that he concluded that the memoranda amounted to unpromulgated rules. His decision against imposing fees was only made because the unpromulgated rules took effect prior to the 1996 revisions to the APA. Judge Benton reinforced the opinion of *Security Mutual Life Insurance Company of Lincoln, Nebraska v. Department of Insurance*, 707 So.2d 929, 23 Fla. L. Weekly D700 (Fla. 1st DCA 1998) which held that Section 120.595(4), Fla. Stat. (Supp.1996) automatically required fees and costs in the event of a successful challenge to an unpromulgated rule. Judge Benton also dissented as to the retroactive application of the proposed rule, finding it incompatible with the procedural requirements of Section 120.57(1)(e), Fla. Stat. (Supp. 1996), which contemplates "de novo review by an administrative law judge" rather than the deference that existing rules receive.

* * *

Second District Court of Appeal

It's always a good idea to give full faith and credit to those carrying concealed weapons. The Second District confirmed this bit of wisdom in the case of convicted felons, if their civil

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rights have been restored in the state in which they were convicted. In *Schlenther v. Department of State, Division of Licensing*, 23 Fla. L. Weekly D1562 (Fla. 2d DCA 1998), a *pro se* litigant challenged the Department's revocation of his concealed weapons permit. The litigant's civil rights had been fully restored in Connecticut prior to his move to Florida, and the Second DCA concluded that restoration of civil rights was entitled to full faith and credit in Florida.

The Court fired back that once appellant's civil rights were restored by the state that suspended them, the matter was completed and Florida had no authority to suspend or restore those rights here on the basis of an earlier out-of-state suspension. Apparently, the fact that the rights had been suspended and restored before the individual arrived in Florida was important to the Court. *See Staluppi v. Department of Highway Safety and Motor Vehicles*, 688 So.2d 431 (Fla. 1st DCA 1997). The litigant was therefore already packing all of his civil rights and arrived here under no disability. The Court went on to interpret Section 944.292(1), Fla. Stat. (1995) and Article IV, Section 8 of the Florida Constitution regarding restoration of civil rights to only apply to Florida offenders.

* * *

A construction contractor suffered two strikes against him in *State v. Bowling*, 23 Fla. L. Weekly D1553 (Fla. 2nd DCA 1998). The contractor had been prosecuted by the Construction Industry Licensing Board and suffered a $5,000 fine and the revocation of his license. Section 489.129(1)(k), Fla. Stat. (1993). A trial court concluded that this punishment was sufficient to constitute "criminal punishment" and that the double jeopardy clause was therefore invoked. *United States v. Halper*, 490 US 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989).

Relying on more recent Supreme Court precedent, the Second District Court of Appeal reversed. *Hudson v. United States*, ____ US _____, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997); *United States v. Ward*, 448 US 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980). Under the *Hudson* test, the Court must look to the penalizing mechanism to determine whether the Legislature implied a criminal or civil label on it, and to determine whether the statutory scheme is so punitive that its criminal nature must be imputed. Concluding that the licensing fine was administrative and civil in nature, and that it was not so punitive to overcome such legislative intent, the Second District reversed.

Third District Court of Appeal

The appropriateness of declaratory statements was addressed again in *Investment Corp. Palm Beach v. Div. of Pari-Mutuel Wagering, Dep't. of Bus. and Profs'l. Reg.*, 23 Fla. L. Weekly D1621 (Fla. 3d DCA 1998). The petition for declaratory statement sought an opinion regarding the applicability of certain statutory provisions. The Division concluded that the same question may exist at other regulated entities and that the Division would therefore initiate rulemaking on the subject because it was "generally applicable". Nevertheless, the Division went on to provide its opinions as to issues particular to the appellants.

The majority in the Third DCA found that in this case, the declaratory statement would only be appropriate if it deals with a petitioner's particular situation, but not when it results in an agency statement of general applicability. *Sutton v. Dep't. of Environmental Protection*, 654 So.2d 1047 (Fla. 5th DCA 1995); *Tampa Electric Co. v. Florida Dep't. of Community Affairs*, 654 So.2d 998 (Fla. 1st DCA 1995); *Regal Kitchens, Inc. v. Fla. Dep't. of Revenue*; 641 So.2d 158 (Fla. 1st DCA 1994).

In dissent, Judge Cope believed the issue of whether the case was appropriate for a declaratory statement was not properly preserved below. The appellant was actually the party requesting the declaratory statement and, in the dissent's view, could not challenge an unfavorable opinion after asking for it. *Commission on Ethics v. Barker*, 677 So.2d 254, 256 (Fla. 1996). The dissent also invested some time in the analysis of the APA's declaratory statement provision. It noted that the notice provision of the declaratory statements, and allowance for intervention by affected parties, indicated that declaratory statements would have applicability beyond a single party, noting the majority's disagreement with *Chiles v. Department of State, Division of Elections*, 23 Fla. L. Weekly D1225, D1226 (Fla. 1st DCA May 12, 1998).

Fourth District Court of Appeal

Milk may do a body good, but milkshaking a horse in order to improve its performance could result in penalties against a veterinarian. However, when a department reviews the appropriate penalty, it should take into consideration its previous sanctions against other similarly downtrodden. *Plante, VMD v. Department of Bus. and Prof. Reg., Div. of Pari-mutuel Wagering*, 23 Fla. L. Weekly D1338 (Fla. 4th DCA 1998). When counsel appeared by telephone and submitted a written document comparing the Division's treatment of similar cases, the Division refused to recognize that document by granting a Motion to Strike. The Fourth District Court of Appeal remanded the case for reconsideration of the penalty imposed in light of the precedents submitted by appellant, because stare decisis is a "core principal" in our system of justice which would be equally applied in administrative proceedings. *Gessler v. Dep't. of Bus. and Prof. Reg.*, 627 So.2d 501, 503-04 (Fla. 4th DCA 1993). However, other information in counsel's document which related to facts which were not before the hearing officer were a horse of a different color and would not be considered. *School Board of Leon County v. Weaver*, 556 So.2d 443 (Fla. 1st DCA 1990); *Ong v. Dep't. of Prof. Reg.*, 565 So.2d 1384 (Fla. 5th DCA 1990).

* * *

A trial court's Order of Contempt against the Department of Children and Family Services was found to have violated the separation of powers doctrine because it considered the Department's ability to move funds in order to comply with the Order's

Mandate. *State, Dep't. of Children and Family Services v. Richard Birchfield*, 23 Fla. L. Weekly D1662 (Fla. 4th DCA 1998). The Fourth District quoted *State Dep't. of Health and Rehab. Services v. Brooke*, 573 So.2d 363, 371 (Fla. 1st DCA 1991) to repeat the edict that transfers of appropriated monies among agency programs are strictly within the Agency's discretion and no member of the judiciary can direct an agency to spend its money in a particular way.

Fifth District Court of Appeal

When you've been convicted of conspiracy and money laundering, continuing to offer dental services to Medicaid providers is a tough road to hoe, so said the Court in *Rowe v. Agency for Health Care Admin.*, 23 Fla. L. Weekly D1646 (Fla. 5th DCA 1998). The dentist's Medicaid privileges were terminated for not less than twenty (20) years following his convictions. He challenged that decision by oaring out *ex post facto* and due process constitutional claims. Because the Medicaid statute was regulatory, rather than penal in nature, *ex post facto* prohibitions did not apply. *Manocchio v. Kusserow*, 961 F. 2d 1539, 1542 (11th Cir. 1992), *Blankenship v. Dugger*, 521 So.2d 1097, 1099 (Fla. 1988). A claim that he failed to receive proper notice of recommended and final orders, and therefore was denied due process, was also cast aside. The decision to have Medicaid provider status walk the plank was affirmed.

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Administrative Law Section 1997-98 Actual Budget

Revenues	
Dues	$19,520
Dues Retained by Bar	9,760
Affiliate Dues	500
Affiliate Dues Retained by Bar	400
Total Dues	**$9,860**
Other Revenue	
CLE Courses	$2,816
Credit Card Fees	(23)
Audiotape Sales	1,855
Interest	5,417
Course Material Sales	41
Section Service Programs	7,600
Contributions	4,250
Total Revenue	**$31,816**
Expenses	
Staff Travel	$249
Postage	327
Printing	39
Newsletter	1,136
Photocopying	179
Meeting Travel	173
Committees	18
Council Meetings	185
Convention Meeting	449
Awards	528
Council of Sections	100
Section Service Programs	4,262
Total Expenses	**$7,645**
Beginning Fund Balance	**$58,437**
Plus Revenues	**31,816**
Less Expenses	**7,645**
Ending Fund Balance	**$82,608**

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Endnotes:

[1] For example, former §120.59(6)(d) allowed hearing officers to recommend the award of attorney's fees in situations where the hearing officer determined that a party participated in a proceeding for an improper purpose. However, parties seeking attorney's fees for frivolous appeals of administrative decisions had to thumb over to former §120.57(1)(b)10 for the proper authority.

[2] Although attorneys can look primarily to §120.595, attorney's fees provisions still remain under other sections such as §57.111, §120.569(2)(c), and §112.317.

[3] *Security Mutual Life Ins. v. Dept. of Insurance*, 707 So.2d 929 (Fla. 1st DCA 1998).

[4] F.S. §120.57(1)(b) (1998).

[5] Section 120.595(1)(e) defines "improper purpose" as participation in a §120.57(1) proceeding "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity."

[6] F.S. §120.595(1)(c) (1998).

[7] Because agencies do not participate in formal administrative proceedings for the purpose of substantially changing the outcome of their own proposed or final action, it is unclear how an agency could be a "nonprevailing adverse party" such that it could be subject to an assessment of attorney's fees under §120.595(1)(a). Thus, a plausible argument could be made that §120.595(1)(a) does not permit parties to obtain attorney's fees from agencies.

[8] *Id*.

[9] Presumably, the theory behind this "attorney's fees immunity" for intervenors is based on the notion that a party that is supporting an agency position cannot, by definition, be participating for an improper purpose. However, if an ALJ ultimately determines that an intervenor failed to establish its standing to participate in the proceeding, should the petitioner be permitted to request attorney's fees if the petitioner expended resources to defeat the intervenor's standing? It appears that the answer is "no" under §120.595(1).

[10] Similarly, intervenors supporting an agency's position are not entitled to recover attorney's fees, but there appears to be no limitation in §120.595 on the ability of an intervenor opposing an agency's position to seek attorney's fees. However, it is unclear, based on the previous discussion of the statute's definition of "nonprevailing adverse party," from what party such an intervenor could recover attorney's fees.

[11] *Perdue*, 1998 Fla. ENV LEXIS 93 at 6.

[12] *Greenspace*, 1998 Fla. ENV LEXIS 20 (January 14, 1998).

[13] F.S. §120.595(2) (1998).

[14] *Id*.

[15] *Id*.

[16] *Id*.

[17] *Environmental Trust v. Dept. of Environmental Protection*, 1998 Fla. App. LEXIS 6143 (June 3, 1998).

[18] The proposed rule was also found to be invalid for prospective application because the Legislature had, in the interim, eliminated the reimbursement program. *Environmental Trust*, 1998 Fla. App. LEXIS 6143 at 7.

[19] F.S. §120.595(3) (1998).

[20] *Id*.

[21] *Lakeland Memorial Gardens, Inc. v. Dept. of Banking and Finance*, 20 FALR 818 (DOAH Case No.97-2840RX).

[22] *Lakeland Memorial*, 20 FALR at 823 (emphasis added).

[23] F.S. §120.595(4) (1998).

[24] *Security Mutual Life Ins. v. Dept. of Insurance*, 707 So. 2d 929 (Fla. 1st DCA 1998).

[25] *Security Mutual*, 707 So.2d at 931.

[26] Frazier, Seann M., "Case Notes, Cases Noted and Notable Cases," Admin. Law Section Newsletter, Vol. XX, No. 1, July 1998 at 9.

[27] This language formerly appeared in §120.57(1)(b) (1995).

[28] *Procacci Commercial Realty, Inc. v. Dept. of Health and Rehab. Serv.*, 690 So. 2d 603, 609 (Fla. 1st DCA 1997) (citation omitted). Despite going through the painstaking process of describing how meritless an appeal must be to constitute a frivolous appeal, the First DCA found that the "appeal taken by Procacci was frivolous, meritless, or an abuse of the appellate process." *Id.* at 609.

[29] *Life Care Centers v. Health Care and Retirment Corp.*, 692 So. 2d 243 (Fla. 1st DCA 1997).

[30] *Life Care*, 692 So. 2d at 244.

Craig H. Smith *is an attorney with the Fort Lauderdale offices of Broad & Cassel, where he practices health law and administrative law.*

FROM THE CHAIR

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received notice of the action or intended action; how his or her substantial interests are affected; a statement of material facts disputed or a statement that no material facts are disputed; a statement of the ultimate facts alleged, including a statement of the specific facts warranting reversal or modification of the proposed action; and a statement of the specific relief sought.

So far, so good. These requirements are all set forth in the Uniform Rules. What is new are the amendments to Section 120.569 which state that the agency "shall carefully review the petition to determine if it contains all of the required information" and, if it does not, it *shall* be dismissed (with at least one opportunity to file an amended petition). It further provides that a petition may be referred to D.O.A.H. only if the petition is in *substantial compliance* with the above-listed requirements.

I deal with licensure and disciplinary proceedings. If the agency I represent issues a notice of intent to deny a license and the applicant even just scribbles a note and says he or she wants a hearing, the applicant gets a hearing. If the scribbled note indicates that he or she is disputing facts, the case is referred to D.O.A.H. for an evidentiary hearing.

But now, once the Uniform Rules are adopted carrying out the directives of Chapter 98-200, the agency would no longer be authorized to provide a hearing. It would be *required* to dismiss the petition. If the petition is amended, but is still not in substantial compliance, the agency will have to dismiss again. If the individual cannot figure out how to do it right, that person will need to give up on having a hearing or hire a lawyer.

Is this really the direction in which Administrative Law ought to be going? Perhaps there is some complex area of Administrative Law, such as Certificate of Need litigation or environmental permitting, where this level of detail and specificity is necessary. If so, then perhaps there should be different statutory provisions for those areas. But incorporating so many of the pleading strictures of civil practice into the general administrative arena puts up formidable roadblocks to achieving open and useful interaction between government agencies and the public and seriously undermines the laudable purpose of the APA. We should consider future changes to the APA with eyes to revert back to original high goals of easy access and affordability for citizens.

What is the Burden of Proof in Cases Involving Challenges to Proposed Rules, and Who Has It?

by Kent Wetherell

Prior to the 1996 revision of the Administrative Procedure Act (APA), the answer to the question posed above was simple. The *petitioner* had the burden to prove, by a *preponderance of the evidence*, that the proposed rule was an invalid exercise of delegated legislative authority.

In an effort to "level the playing field" in cases involving challenges to proposed rules, the 1996 Legislature amended section 120.56(2)(a), F.S., to read:

> . . . . The petition [challenging the proposed rule] shall state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. *The **agency** then has the burden to prove that the proposed rule is not an invalid exercise of delegated legislative authority* as to the objections raised. . . . .

(emphasis supplied). While this statute does not specifically address the agency's burden of proof, there is nothing in the legislative history of the 1996 APA amendments to suggest that the agency's burden of proof would not be a preponderance of the evidence. Thus, after the 1996 APA amendments, the question posed above would seemingly be answered as follows: The *agency* has the burden to prove, by a *preponderance of the evidence*, that the proposed rule in not an invalid exercise of delegated legislative authority.

However, two recent opinions from the First District Court of Appeal have called this answer into question. In *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, the panel interpreted section 120.56(2)(a), F.S., to impose a burden of production on the petitioner prior to the burden of persuasion shifting the agency, and in *Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks*, the panel held that the agency's burden of proof is not a preponderance of the evidence. Rehearing and has been sought in both of these cases and, for reasons discussed in this article, rehearing is necessary to clarify the appropriate burden of proof in cases involving challenges to proposed rules and to clarify the proper allocation of the burden of proof amongst the parties. In *Consolidated-Tomoka* the panel offered its interpretation of section 120.56(2)(a), F.S., even though the issue was not raised in the 336 pages of briefs filed by the parties and amici. The panel approved the approach adopted by Administrative Law Judge (ALJ) Donald Alexander which requires the party challenging a proposed rule to present evidence necessary to establish a factual basis for its objections to the proposed rule. Only if the petitioner satisfies this burden of production does the burden of persuasion shift to the agency to prove that the proposed rule is not an invalid exercise of delegated legislative authority.

The burden shifting approach adopted by the panel in *Consolidated-Tomoka* is not apparent on the face of section 120.56(2)(a), F.S. The only burden that the statute places on the petitioner is a *pleading* requirement to "state with particularity" the objections to the proposed rule and the grounds for invalidity. It does not impose a burden of production on the petitioner.

By contrast, section 120.56(4), F.S., clearly imposes a burden of production on the petitioner in cases involving challenges to agency statements defined as rule. Section 120.56(4)(a), F.S., imposes a *pleading* requirement (i.e., "state with particularity facts sufficient to show . . .") while section 120.56(4)(b), F.S., imposes a *burden of production* (i.e., "If . . . the petitioner proves the allegations of the petition, . . ."). In such cases, if the petitioner satisfies its burdens of pleading and production, the ultimate burden of persuasion is shifted to the agency to prove that rulemaking is "not feasible and practicable."

Had the Legislature intended to impose a burden of production on petitioners in cases involving challenges to proposed rules, it could have done so in language similar to that in section 120.56(4), F.S. That the Legislature used different language in sections 120.56(2)(a) and 120.56(4)(a)-(b), F.S., suggests that it intended a different procedure to apply in cases arising under each section. Unfortunately, the panel's decision in *Consolidated-Tomoka* does not reflect this distinction.

The panel, like ALJ Alexander, cited the "possibility" of the agency being forced to pay the petitioner's attorneys' fees as a basis for its "more practical" interpretation of section 120.56(2)(a), F.S. However, it is important to note that a petitioner who prevails in a rule challenge proceeding is not automatically entitled to an award of attorneys' fees against the agency. Such an award is made *only if* the ALJ determines that the agency was not "substantially justified" in promulgating the rule and no "special circumstances" exist which would make the award unjust, *and* the award is capped at $15,000.

The *Consolidated-Tomoka* panel does not specify the amount of evidence that the petitioner must produce to overcome the judicially-established burden of production. As a general rule, a burden of going forward with the evidence requires the party with the burden to make a "prima facie showing." A prima facie showing requires evidence that, in the judgment of the law, is sufficient to establish a fact if no evidence is offered to contradict it. Because findings of fact in administrative proceedings must be supported by a preponderance of the evidence, the requirement that that the petitioner

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establish a "factual basis" for its objections to the proposed rule is functionally indistinguishable from the law prior to the 1996 APA amendments where the petitioner had to prove the invalidity of the proposed rule by a preponderance of the evidence.

The impact of the *Consolidated-Tomoka* panel's interpretation of section 120.56(2)(a), F.S., is exacerbated by the panel's decision in *Florida Association of Blood Banks*. In that case, the panel held that the ALJ erred in requiring the agency to prove the validity of its proposed rule by a preponderance of the evidence. The panel did not identify what it considered to be the proper burden of proof, but inherent in the panel's decision is that "preponderance of the evidence" is too stringent of a standard. As noted above, there is nothing in the legislative history of the 1996 APA amendments which suggested an intent that the burden of proof imposed on the agency in section 120.52(2)(a), would be something other than a preponderance of the evidence.

If the standard by which the agency must prove the validity of its proposed rule is less than a preponderance of the evidence (e.g., a scintilla of evidence) and if the petitioner has the initial burden of production, then the language in section 120.56(2)(a), F.S., which purports to shift the burden of proof in rule challenge cases to the agency is meaningless. In this regard, if the petitioner fails to provide a "factual basis" for its objections to the proposed rule, then the proposed rule will be upheld. Even if the petitioner establishes a factual basis for its objection to the proposed rule, the agency will be able to overcome the objection by some showing less than a preponderance of the evidence.

In sum, the panels' decisions in *Consolidated-Tomoka* and *Florida Association of Blood Banks* may have the effect of strengthening this perception that "courts have made it too difficult for challengers to win in rule challenge cases." In so doing, the decisions will frustrate the legislative intent of the rulemaking reforms in the 1996 APA amendments. Accordingly, the First DCA should review the panels' decisions en banc and answer the question raised in the title of this article in a manner that furthers the legislative intent of section 120.56(2)(a), F.S. Specifically, the Court should unequivocally hold that the *agency* has the burden of proof (production and persuasion) in cases involving challenges to proposed rules and it must demonstrate, by a *preponderance of the evidence*, that the proposed rule is not an invalid exercise of delegated legislative authority.

First DCA Construes New Rulemaking Standard

By Donna E. Blanton
Steel Hector & Davis LLP

The first two significant appellate court opinions construing the new rulemaking standard in the Administrative Procedure Act (APA) were released in July by the First District Court of Appeal. These opinions, *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 23 Fla. L. Weekly D1787 (Fla. 1st DCA July 29, 1998) and *Department of Business and Professional Regulation v. Calder Race Course, Inc.*, 23 Fla. L. Weekly D1795 (Fla. 1st DCA July 29, 1998), were anxiously awaited by both state agencies and regulated interests.

The *Consolidated-Tomoka* opinion is clearly the most significant. It establishes a broad new standard by which agency rules will be evaluated. The new test, as articulated by Judge Padovano for the unanimous three-judge panel, is whether a particular agency rule "falls within the *range of powers* the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction." (Emphasis supplied). *See* 23 Fla. L. Weekly at D1790. From now on, courts will find that a rule "is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented," Judge Padovano wrote. "The class of powers and duties delegated to an agency could be defined broadly or specifically depending on the Legislature's objective." *Id*.

The court used the new test to find that the rules challenged in the *Consolidated-Tomoka* case are valid exercises of delegated legislative authority. These proposed rules define two areas within the St. Johns River Water Management District as hydrologic basins and establish more restrictive permitting and development requirements within these basins. The authority for these rules is statutory language directing the agency to "not allow harm to water resources," to "delineate areas within the district wherein permits may be required," and to "require such permits and impose reasonable conditions" to assure that all systems will comply with state law.

The petitioners challenged the rules as violative of the new rulemaking standard in the APA. An administrative law judge last year invalidated the proposed rules, reasoning that they are based on statutes that provide only general, non-specific descriptions of the agency's duties. The district court, however, found that the water management district had the authority to adopt all of the challenged rules, reasoning that if statutes had to refer to such specific subjects as runoff, recharge, and floodplain requirements, "enabling statutes would have to be as detailed as the rules themselves, and the point of rulemaking would be defeated entirely." *Id*.

In the *Calder* case, the court referenced the new test outlined in the *Consolidated-Tomoka* opinion and then applied it to invalidate proposed rules at issue in *Calder*. This case involved rules proposed by the Division of Pari-Mutuel Wagering that authorized searches of persons and places within a permitted pari-mutuel wagering facility. The statutory language that formed the purported authority for the rules authorized the agency only to "conduct investigations" in enforcing its responsibilities. The court, in the unanimous opinion authored by Judge Ervin, reasoned that an investigation is not the same as a search and that the statutory authority is inadequate to support the rules. 23 Fla. L. Weekly at D1796.

The language construed by the court in both opinions was adopted by the Legislature in 1996 as part of a major revision to the APA. It provides in sections 120.52(8) and 120.536, Florida Statutes:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. *An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute.* No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.
(Emphasis supplied).

The court in *Consolidated-Tomoka* focused on the highlighted sentence of the new rulemaking standard. After a discussion of the sentence's "ambiguous" meaning, the court declined to evaluate agency rules based on the sufficiency of detail in the language of the enabling statute. "An argument could be made in nearly any case that the enabling statute is not specific enough to support the precise subject of a rule, no matter how detailed the Legislature tried to be in describing the power delegated to the agency," Judge Padovano wrote. Thus, the court found that the new standard is "a functional test based on the nature of the power or duty at issue and not the level of detail in the language of the applicable statute." *See* 23 Fla. L. Weekly at D1790.

The new "range of powers" test is quite broad, and concerns have arisen that the court has essentially invalidated the Legislature's 1996 changes to the rulemaking standard. Attorneys for Consolidated-Tomoka filed a motion in August asking for rehearing en banc, rehearing, and/or certification of the case to the Florida Supreme Court as one raising questions of great public importance. In

continued...

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their view, the new court-created standard gives agencies much more discretion in their rulemaking activities than the Legislature intended in 1996.

Before the 1996 amendments to the APA, courts granted agencies wide discretion in the exercise of their rulemaking authority. Agency rules were generally upheld by courts if the rules were "reasonably related" to the purposes of the enabling legislation and were not arbitrary and capricious. The court in both *Consolidated-Tomoka* and *Calder* acknowledged that the old "reasonably related" standard was overruled by the Legislature. "[A]n administrative agency can no longer justify a rule on the ground that it is reasonably related to the enabling statute. . . . The Legislature has plainly said that a rule is not valid merely because the agency can show that it is somehow relevant to the objectives stated in the law," Judge Padovano wrote. Nonetheless, the court expressed difficulty determining from the new statutory language just what kind of legislative delegation *is* sufficient to support a rule. The ultimate resolution announced by the court is the new "range of powers" test.

Some legislators were upset by the court's opinion in *Consolidated-Tomoka*. Rep. Ken Pruitt, R-Port St. Lucie, sent a memo to all members of the House and Senate on August 12 sharply criticizing the opinion and expressing his intent to amend the rulemaking standard yet again to clarify the Legislature's intent. Pruitt also noted that the court's opinion ignored the amicus curiae brief filed in the case by the Legislature.

"I am greatly disturbed by the Court's refusal to implement our legislative intent and wanted to inform each and every one of you that our efforts to reduce agency discretion, and minimize the implementation of policies without legislative direction, [have] been rebuffed by the 1st District Court," Pruitt wrote. "I consider this decision to be a miscarriage of justice and an utter refusal by the courts to follow the Legislature's directive, which clearly sought to limit agency discretion in their rulemaking activities. . . . I hope you will join me in making sure that we add language to Chapter 120 which unequivocally takes policy making functions, which should be reserved to the Legislature, out of the hands of agencies."

Donna E. Blanton *is an attorney in the Tallahassee office of Steel Hector & Davis LLP, which filed an amicus curiae brief in Consolidated-Tomoka on behalf of the Florida Home Builders Association and the Florida Association of Realtors.*

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Schedule of Events

Thursday, October 29, 1998

1:30 p.m. - 2:00 p.m.
Late Registration

2:00 p.m. - 2:30 p.m.
Welcome and Introductions

2:30 p.m. - 3:35 p.m.
***Our Mutual Friend* and the Future of Florida's Judiciary:**
Specialty Courts, Divisions, or another DCA?
Moderator: Charles Stampelos
- Judges Charles J. Kahn Jr., Peter D. Webster, and William A. Van Nortwick, First District Court of Appeal

3:35 p.m. -3:50 p.m.
Break

3:50 p.m. - 5:00 p.m.
***Oliver Twist:* Variances and Waivers Revisited**
Moderator: Lynda L. Goodgame, Department of Business and Professional Regulation
- Edwin A. Bayó, Assistant Attorney General
- Martha J. Edenfield, Pennington, Moore, Wilkinson & Dunbar, P. A.
- Richard A. Lotspeich, Messer, Caparello & Self, P.A.

5:00 p.m. - 7:00 p.m.
Reception for First District Court of Appeal Judges and Administrative Law Judges

Friday, October 30, 1998

9:00 a.m. - 10:00 a.m.
***Great Expectations:* Use of Alternative Procedures Under the APA; Petitions to Initiate Rulemaking; Summary Procedures, Mediation**
Moderator: Donna E. Blanton, Steel, Hector & Davis
- Patrick (Booter) Imhof, Legislative Research Director, House Committee on Utilities and Communications
- B. Suzi Ruhl, Legal Environmental Assistance Foundation
- M. Catherine Lannon, Assistant Attorney General

10:00 a.m. - 10:20 a.m.
***Martin Chuzzlewitt* and the List: The Next Step for Rules Listed Under Section 120.536**
- Scott Boyd, Staff Attorney, Joint Administrative Procedures Committee

10:20 a.m. - 10:30 a.m.
Questions and Answers

10:30 a.m. - 10:45 a.m.
Break

10:45 a.m. - 12:00 noon
***A Tale of Two Cities:* Federal Administrative Caselaw and the Florida Administrative Procedures Act**
Moderator: Deborah K. Kearney, General Counsel, Constitution Revision Commission
- J. Stephen Menton; Rutledge, Ecenia, Underwood, Purnell & Hoffman, P.A.
- James Rossi, Florida State University College of Law
- Scott Boyd, Staff Attorney, Joint Administrative Procedures Committee

12:00 noon - 1:30 p.m.
Luncheon and Keynote Address
- Martha W. Barnett, Holland and Knight, Constitution Revision Commission

1:30 p.m. - 2:20 p.m.
***Pickwick Papers:* Declaratory Statements for the Particular Masses?**
Point:
William M. Furlow III, Katz, Kutter, Haigler, Alderman, Bryant & Yon, P.A.
Counterpoint:
Dan R. Stengle, General Counsel, Office of the Governor

2:20 p.m. - 3:10 p.m.
***Bleak House:* The Changing Face of Nonrule Policy:**
Petitions for Determination of Use of NonRule Policy After *The Environmental Trust v. State Department of Environmental Protection*
Moderator: Ralph A. DeMeo, Hopping Green Sams and Smith, P.A.
- Stephanie G. Kruer, Department of Community Affairs
- F. Perry Odom, Department of Environmental Protection
- Lawrence E. Sellers, Jr., Holland and Knight

3:10 p.m. - 3:25 p.m. **Questions and Answers**

3:25 p.m. - 3:35 p.m. **Break**

3:35 p.m. - 4:45 p.m.
***Hard Times:* Rulemaking and the Aftermath of the 1996 Amendments and the *Consolidated Tomoka* and *Calder* Decisions; A Mock Oral Argument**
Advocates: Mary F. Smallwood, Ruden McCloskey Smith Schuster & Russell, P.A., and William E. Williams, Huey Guilday and Tucker, P.A.
Chief Judge: David M Maloney, Division of Administrative Hearings
Members of the Court:
- Robert M. Rhodes, General Counsel, St. Joe Paper Co.,
- Allen R. Grossman, Assistant Attorney General, and
- Paul H. Amundsen, Amundsen and Moore, P.A.

4:45 p.m. - 5:00 p.m. **Questions and Answers**

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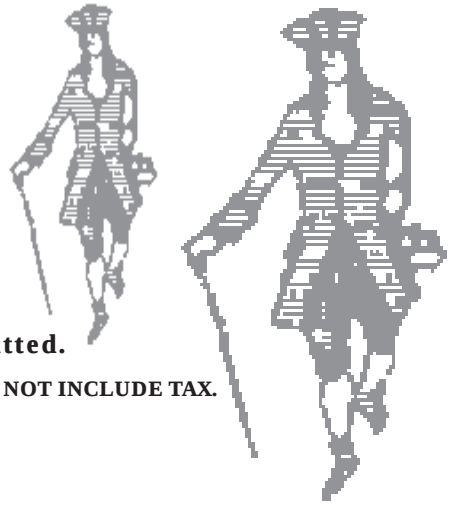

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