

# **Final Report of Uniform Rules of Procedure Committee**

Presented on June 18, 2020

## **Committee Members**

Paul Drake, Reporter  
Seann Frazier  
Judge Yolonda Green  
Judge Elizabeth McArthur  
Judge Li Nelson  
Shaw Stiller  
Judge David Watkins  
Larry Sellers, Chair

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**April 27, 2020**

# **Final Report of Recommended Changes to the Uniform Rules of Procedure**

**April 27, 2020**

An ad hoc committee of the Executive Council of the Administrative Law Section of The Florida Bar was appointed by then-Chair Judge Gar Chisenhall and tasked with reviewing the Uniform Rules of Procedure and recommending any appropriate changes. Members of the Committee are: Paul Drake (Reporter), Seann Frazier, Judge Yolonda Green, Judge Elizabeth McArthur, Judge Li Nelson, Shaw Stiller, Judge Dave Watkins and Larry Sellers (Chair).

The Committee met 13 times over 15 months. It benefited greatly from numerous public comments. The Committee initially solicited suggestions and then developed several drafts that were distributed for comment, including drafts dated June 18, September 18 and November 4, 2019, all of which were posted on the Section web site and distributed to all Section members via e-mail. Updates on the Committee's work were provided to the Section's Executive Council in June and November 2019. The Second Report of the Uniform Rules of Procedure Committee dated November 1, 2019, may be viewed [here](#).

Following this Second Report, the Committee solicited and evaluated additional comments and issued yet another draft for comment, dated January 31, 2020. This draft also was posted on the Section's web site and distributed to all Section members via e-mail. The Committee received several new comments, and it approved final recommended changes at its last meeting, on April 27, 2020. The recommended changes are attached. They also may be viewed [here](#).

The recommendations show the specific changes in legislative format, and a comment section following each rule describes each change to that rule. The recommended changes address, among other things: filing by e-mail, new requirements for qualified representatives, contents of the notice of rights, new requirements relating to service of papers, appearances by specifically-named persons, intervention, additional requirements in connection with the duty to confer, a new rule regarding disqualification of the presiding officer, the computation of time, informal proceedings, emergency action, and bid protests.

The Committee requests that the Executive Council approve these recommended changes for transmittal to the Administration Commission, which has the exclusive authority to propose and adopt changes to the Uniform Rules of Procedure.

The Uniform Rules were last updated in 2013 based on recommendations from the Section. For a summary of these changes, see the [April 2013](#) issue of the ALS newsletter. As in 2013, any amendments to the Uniform Rules will become effective only if formally proposed and adopted by the Administration Commission in accordance with the rulemaking process in the APA.

**Recommended Changes to the  
Uniform Rules of Procedure**

**April 27, 2020**

**The Florida Bar Administrative Law Section's  
Recommended Changes to the Uniform Rules of Procedure  
(April 27, 2020)**

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-101.001 Statement of Agency Organization and Operation.**

(1) No change.

(2) The Statement of Agency Organization and Operation shall be reviewed and updated annually. The Statement shall:

(a) through (d) No change.

(e) ~~State whether~~ Describe the manner by which documents can be filed by e-mail or facsimile transmission, including applicable telephone numbers and e-mail addresses where filings may be submitted; If the agency accepts e-filing, describe the manner by which documents can be e-filed, including the applicable website(s) through which the filings may be submitted. ~~and s~~ Set forth the acceptable nature and scope of such filings, including the following:

~~That~~ the filing date for a document that has been e-filed or transmitted by e-mail or by facsimile shall be the date the agency receives the complete document. Any document received by the office of the agency clerk after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day.

(f) No change.

(g) ~~Set forth t~~ The agency's hours of operation, including the hours during which filings will be accepted.

(h) The legal holidays and other days on which the agency will be closed.

(i) The public notification procedures for unscheduled agency closures.

(~~h~~j) No change.

*Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History—New 4-1-97, Amended 1-15-07, 12-24-07, 2-5-13, 6-26-13, \_\_\_\_\_.*

**Comment:** *Requires agencies to describe how to file documents by e-mail or fax, and e-file if allowed, as part of their Statement of Agency Organization and Operation. Requires the Statement to list the days on which the agency will be closed and how the public will be informed of unexpected closures. To implement the statutory mandate that the Statement be maintained as current, this proposal requires the Statement to be reviewed and updated annually. The Administration Commission is encouraged to require all agencies to adopt some form of filing by e-mail.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-105.0027 Intervention.**

(1) Persons other than the original parties to a pending proceeding whose substantial interests will be affected by the disposition of the declaratory statement and who desire to become parties may move the presiding officer for leave to intervene. ~~The presiding officer shall allow for intervention of persons meeting the requirements for intervention of this rule.~~ Except for good cause shown, motions for leave to intervene must be filed within 21 days after publication of (or such later time as is specified in) the notice in the Florida

Administrative Register. ~~The presiding officer may impose terms and conditions on the intervenor to limit prejudice to other parties.~~

(2) and (3) No change.

(4) The presiding officer shall allow persons meeting the requirements of this rule to intervene. The presiding officer may impose terms and conditions on the intervenor to limit prejudice to other parties.

(5) An intervenor may, within 7 days of (or such later time as is specified in) the order granting intervention, file a response to the petition for declaratory statement. No reply or other paper directed to a timely response may be filed absent leave granted by order of the presiding officer.

*Rulemaking Authority 14.202, 120.54(5)(b)6. FS. Law Implemented 120.54(5)(b)6. FS. History—New 1-15-07, Amended 2-5-13, \_\_\_\_\_.*

***Comment:*** *Reorganizes existing language, relocating two sentences from (1) to (4) for improved organization and clarity. Provides basic guidelines in (5) for an intervenor's written submission and responses thereto from others.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-105.003 Agency Disposition.**

The agency may hold a hearing to consider a petition for declaratory statement. ~~If the agency is headed by a collegial body, it shall take action on a petition for declaratory statement only at a duly noticed public meeting.~~The agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts. Within 90 days of the filing of the petition, the agency shall render a final order denying the petition or issuing a declaratory statement.

*Rulemaking Authority 14.202, 120.54(5)(b)6. FS. Law Implemented 120.54(5)(b)6. FS. History—New 4-1-97, Amended 1-15-07, \_\_\_\_\_.*

***Comment:*** *Removes language stating that, if an agency is headed by a collegial body, it shall take action on a petition for declaratory statement only at a duly noticed public meeting. The existing language is proposed for deletion as unnecessarily repetitive of the Sunshine Law.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.103 Computation of Time.**

In computing any period of time allowed by this chapter, by order of a presiding officer, or by any applicable statute, the day of the act from which the period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, ~~or~~ legal holiday, or any other day on which the agency clerk's office is closed, in which event the period shall run until the end of the next day which is not a Saturday, Sunday, ~~or~~ legal holiday, or any other day on which the agency clerk's office is closed. When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, ~~and~~ legal holidays, and any other days on which the agency clerk's office is closed shall be excluded in the computation. As used in these rules, legal holiday means those days designated in Section 110.117, F.S. Except as provided in Rule 28-106.217, F.A.C., five days shall be added to the time limits when service has been made by regular U.S. mail. One business day shall be added when service is made by overnight courier. No additional

time shall be added if service is made by hand, facsimile transmission, or e-mail or when the period of time begins pursuant to a type of notice described in Rule 28-106.111, F.A.C. *Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History—New 4-1-97, Amended 1-15-07, \_\_\_\_\_.*

***Comment:*** *Clarifies that days on which the agency clerk’s office is closed (e.g., emergency closures or discretionary closures by executive order) are treated like weekends and legal holidays in the computation of time.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.104 Filing.**

(1) No change.

(2) All pleadings filed with the agency shall contain the following:

(a) through (c) No change.

(d) The name, address, any e-mail address, Florida Bar number, if applicable, and telephone number of the person filing the pleading;

(e) The signature of the person filing the pleading; ~~and~~

(f) A certificate of service that copies have been furnished to all other parties as required by subsection (4) of this rule;

(3) Any document received by the office of the agency clerk before 5:00 p.m. shall be filed as of that day but any document received after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day.

~~(4) Whenever a party files a pleading or other document with the agency, that party shall serve copies of the pleading or other document upon all other parties to the proceeding. Each pleading or document filed with the agency subsequent to the initial pleading shall be served on the other parties to the proceeding in the manner set forth in Rule 28-106.110. A certificate of service shall accompany each pleading or other document filed with the agency.~~

(5) All parties, if they are not represented, or their attorneys or qualified representatives shall promptly notify all other parties and the presiding officer of any changes to their contact information by filing a notice of the change.

(6) All papers filed shall be titled to indicate clearly the subject matter of the paper and the party requesting relief.

(7) All original pleadings shall be on white paper measuring 8 1/2 by 11 inches, with margins of no less than one inch and consecutively numbered pages. Originals shall be printed or typewritten.

(8) A document shall be filed by only one method (e-filing, service by e-mail, facsimile, courier, hand-delivery, or U.S. mail) and shall not be filed multiple times. A duplicate filing will not be docketed and will be destroyed.

*Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History—New 4-1-97, Amended 1-15-07, 2-5-13, \_\_\_\_\_.*

***Comment:*** *Made additions for clarity and consistency. First deleted sentence in (4) moved to Rule 28-106.110; second sentence reworded to the active voice. Requires that filings must be consecutively numbered.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.105 Appearances.**



~~(1) Counsel or qualified representatives who files a request for a proceeding hearing involving disputed issues of material fact with the agency have~~ has entered an appearance in the proceeding and shall be deemed counsel or qualified representative of record. All others who seek to appear shall file a notice of appearance as soon as possible.

~~(2) A qualified representative who has filed a request for a proceeding on behalf of a party shall be deemed the qualified representative of record until the presiding officer makes the determination required by Rule 28-106.106, F.A.C. The party on whose behalf the qualified representative filed the initial pleading shall make the required filings under Rule 28-106.106, F.A.C. within 7 days of assignment of a presiding officer.~~

~~(2)(3)~~ Service on counsel of record or on a qualified representative shall be the equivalent of service on the party represented.

~~(3)(4)~~ On written motion served on the party represented and all other parties of record, the presiding officer shall grant counsel of record and qualified representatives leave to withdraw for good cause shown. The motion shall contain the address, any e-mail address, and telephone number of the party represented.

~~(4) A qualified representative who has filed an initial pleading or notice of appearance for a party shall be deemed the qualified representative of record until the presiding officer makes the determination required by Rule 28-106.106, F.A.C.~~

~~Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History—New 4-1-97, Amended 2-5-13, \_\_\_\_\_.~~

***Comment:** Requires a person seeking representation by a qualified representative to make the required filings within 7 days of filing a request for hearing if the representative makes the initial filing.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.106 Who May Appear; Criteria for Qualified Representatives; Responsibilities of Party Desiring Representation.**

(1) Any party who appears in any agency proceeding has the right, at his or her own expense, to be represented by counsel or by a qualified representative. Counsel means a member of The Florida Bar in good standing or a law student certified pursuant to Chapter 11 of the Rules Regulating The Florida Bar. ~~An attorney disbarred in any state shall not be authorized to serve as a qualified representative.~~ Qualified representative means a person who meets the qualifications of this section and has been authorized by order of the presiding officer to represent a party in a proceeding. An attorney licensed solely in jurisdiction(s) other than Florida must file a written request to appear as a qualified representative.

~~(2)(a) When a request for a proceeding has been filed on behalf of a party by a qualified representative, that~~ A party seeking representation by a qualified representative shall file a written request under this rule withnot later than 7 days after assignment of the presiding officer. Otherwise, a party seeking representation by a qualified representative after assignment of the presiding officer shall file a written request as soon as practicable, but no later than any pleading filed by the person seeking to appear on behalf of the party. The request shall identify the name, address, e-mail address, and telephone number of the representative and shall state that the party is aware of the services which the representative can provide, and is aware that the party can be represented by counsel at the party's own expense and has chosen otherwise include the following:

(a) The name, address, e-mail address, and telephone number of the representative.

~~(b) The presiding officer shall consider whether the representative is qualified to appear in the administrative proceeding and capable of representing the rights and interests of the party. The presiding officer may consider a representative's sworn affidavit setting forth the representative's qualifications.~~

~~(c) The presiding officer shall determine the qualifications of the representative within a reasonable time after the request required by paragraph (a) is filed.~~

(b) A statement that the party is aware of the services which the representative can provide and aware that the party can represent themselves or be represented by counsel at their own expense, but has chosen otherwise.

(c) A sworn affidavit from the representative setting forth her or his qualifications, listing all proceedings in the past 2 years in which he or she has been granted or denied authorization as a representative, and stating whether the proposed representative has been denied admission to the bar of any jurisdiction. The affidavit shall state that the representative has read, and shall comply with, the relevant provisions of the Uniform Rules of Procedure, Chapter 28-106, F.A.C., and the Administrative Procedure Act, Chapter 120, F. S.; the Florida Rules of Civil Procedure relating to discovery in an administrative proceeding; the rules of evidence, including the concept of hearsay in an administrative proceeding; and the Standards of Conduct for Qualified Representatives, Rule 28-106.107, F.A.C. The affidavit also shall state that the representative is knowledgeable regarding the factual and legal issues involved in the proceedings

(d) If the representative is a lawyer, the sworn affidavit shall also include a list of the jurisdictions in which the lawyer is currently admitted to practice and a certification that the lawyer does not meet any of the disqualifying criteria in paragraph (4).

(3) The presiding officer shall authorize the representative to appear if the presiding officer is satisfied that the representative has the necessary qualifications to responsibly and capably represent the party's rights and interests in a manner which will not impair the fairness of the proceeding or the correctness of the action to be taken.

~~(4) The presiding officer shall make a determination of the qualifications of the representative in light of the nature of the proceedings and the applicable law. The presiding officer shall consider:~~

~~(a) The nature of the proceedings and the applicable law~~representative's knowledge of jurisdiction;

(b) The representative's sworn affidavit;

~~(c) The representative's knowledge of the Florida Rules of Civil Procedure relating to discovery in an administrative proceeding;~~

~~(d) The representative's knowledge regarding the rules of evidence, including the concept of hearsay in an administrative proceeding;~~

~~(e) The representative's knowledge of Chapter 120, F.S., and the uniform rules adopted pursuant to Section 120.54(5), F.S.;~~

~~(f) The representative's knowledge regarding the factual and legal issues involved in the proceedings; and~~

~~(g) The representative's knowledge of and compliance with the Standards of Conduct for Qualified Representatives, Rule 28-106.107, F.A.C.~~

(4) No person currently or formerly admitted to practice law may be authorized as a qualified representative under this rule if that person is disbarred, resigned in lieu of

discipline, is inactive due to incapacity, or is suspended as a disciplinary sanction from practice in any jurisdiction.

(5) Within a reasonable time after the request under paragraph (2) is filed, If the presiding officer shall determines whether a representative is not qualified, If the presiding officer determines that the proposed representative is not qualified, the reason(s) for the decision shall be in writing and included in the record.

*Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5), 120.57(1)(b) FS. History—New 4-1-97, Amended 1-15-07, 2-5-13, \_\_\_\_\_.*

**Comment:**

*Changed heading for rule to provide additional clarity regarding what the rule entails. Provides a definition of qualified representative. Clarifies that attorneys appearing in administrative proceedings must be members of The Florida Bar in good standing and that attorneys licensed in other jurisdictions must file a written request to appear as a qualified representative. Requires a party seeking to be represented by a qualified representative to file the written request for that representation within 7 days of assignment of a presiding officer if the representative filed the request for a proceeding on behalf of the party, or as soon as practicable if the representative did not file the initial pleading. Requires an affidavit from a proposed qualified representative that discloses (a) prior proceedings in which they have been granted or denied permission to appear as a representative and (b) whether they have been denied admission to the bar of any jurisdiction. Requires a lawyer seeking to appear as a qualified representative to disclose all jurisdictions where they are or were licensed to practice and certify that they are not subject to any disqualifying criteria. Requires the affidavit to state that the representative has read and will comply with Chapter 120, the Uniform Rules, specific Rules of Civil Procedure, certain rules of evidence, and the Standards of Conduct for Qualified Representatives. Prohibits a person who is or was admitted to practice in any jurisdiction from being a qualified representative if that person has been disbarred, resigned in lieu of discipline, is inactive due to incapacity, or is suspended as a disciplinary sanction from practice.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.107 Standards of Conduct for Qualified Representatives.**

All qualified representatives shall comply with the following standards of conduct; ~~are mandatory for all qualified representatives.~~

(1) A representative shall comply with the Uniform Rules of Procedure, Chapter 120, Florida Statutes, and all other applicable statutes and rules.

~~(2)~~ A representative shall exercise due diligence to ensure ~~insure~~ that any motion or pleading is filed and argued in good faith.

~~(23)~~ A representative shall advise the client to obey the law.

~~(34)~~ A representative shall not:

(a) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(b) Engage in conduct that is prejudicial to the administration of justice;

(c) Handle a matter which the representative knows or should know that he or she is not competent to handle;

(d) Handle a legal or factual matter without adequate preparation;

(e) Communicate, or cause another to communicate, as to the merits of the proceeding with the presiding officer except on the record or in writing with a copy promptly delivered to the opposing party; or

(f) Communicate with an adverse party regarding matters at issue in the administrative proceeding where the representative knows that the adverse party is represented by an attorney or other qualified representative.

(5) Failure to comply with these provisions shall authorize the presiding officer to disqualify the representative appearing in the administrative proceeding.

*Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History—New 4-1-97, Amended \_\_\_\_\_.*

***Comment:*** *Clarifies the obligation of a qualified representative to comply with governing rules and statutes to ensure that a proposed qualified representative knows about the obligation before entering into the representation.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.110 Service of Papers.**

~~Unless the presiding officer otherwise orders, every pleading and every other paper filed in a proceeding, except applications for witness subpoenas, shall be served on each party or the party's representative at the last address of record.~~

(1) Unless otherwise provided by law, service shall be as provided by this rule.

(2) Whenever a party files a pleading or other document, that party shall serve copies of the pleading or other document upon all other parties to the proceeding.

(3) Service upon an unrepresented party shall be made to that party's address of record. Service upon a represented party shall be made by service upon that party's attorney or qualified representative at the attorney or representative's address of record.

(4) If both the filer's and recipient's address of record includes an e-mail address, service shall be made by e-mail.

(5) A pleading or document served by e-mail after 5:00 p.m. shall be deemed served as of 8:00 a.m. the following day.

(6) A certificate of service shall accompany each filing. When any party, representative, or attorney certifies in substance:

"I certify that the foregoing document has been furnished to (here insert name or names, addresses used for service, and mailing addresses) by (e-mail) (delivery) (mail) (fax) on ..... (date) ..... [Name, Title, Signature]"

the certificate is taken as prima facie proof of such service in compliance with this rule.

*Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History—New 4-1-97, \_\_\_\_\_.*

***Comment:*** *Consolidates existing provisions regarding service from several rules into one. Adds requirement for service by e-mail when address of record includes an e-mail address, a form for certificate of service, and a provision that service by e-mail after 5:00 p.m. shall be deemed service as of 8:00 a.m. the following day. Designed to make clear that this does not displace service requirements in specific statutes, such as in Sections 120.60(5) or 766.303, F. S.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.111 Point of Entry into Proceedings and Mediation.**

(1) The notice of agency decision shall contain the information required by Section 120.569(1), F.S. The notice shall include the address for delivery by mail or courier, e-mail address, and telephone number for the agency clerk and instructions on how to file documents with the agency clerk by e-mail, electronic filing, or by facsimile transmission, as applicable. The notice shall also advise whether mediation under Section 120.573, F.S., is available, and if available, that pursuit of mediation will not adversely affect the right to administrative proceedings in the event mediation does not result in a settlement.

(2) No change.

(3) ~~An agency may, for good cause shown, grant a~~ The notice of rights shall advise that a person may request for an extension of time for to filing an initial pleading, and that the request shall state good cause for the extension. Requests for extension of time must be filed with the agency prior to the applicable deadline. Such requests for extensions of time shall contain a certificate that the moving party has consulted with all other parties, if any, concerning the extension and that the agency and any other parties agree to or oppose the extension. An agency may grant the request for extension for good cause shown. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

(4) Any person who receives written notice of an agency decision and who fails to file a timely written request for a hearing ~~within 21 days~~ waives the right to request a hearing on such matters. This provision does not eliminate the availability of equitable tolling as a defense.

(5) No change.

*Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History—New 4-1-97, Amended 3-18-98, 1-15-07, \_\_\_\_\_.*

***Comment:*** *Requires the notice of administrative rights to include directions on how to file by all methods accepted by the agency. Requires the notice of administrative rights to advise of the right to request an extension of time to file a request for hearing for good cause shown.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.201 Initiation of Proceedings.**

(1) through (3) No change.

(4) A specifically-named person, who is the subject of the agency’s proposed action and who was not made party to the original proceeding, may become a party to the proceeding by entering an appearance as a respondent and identifying how their substantial interests are being determined. Such named party respondent shall be entitled to raise issues in support of the agency’s determination or defenses to the allegations in the petition.

*Rulemaking Authority 14.202, 120.54(3), (5) FS. Law Implemented 120.54(3) FS. History—New 4-1-97, Amended 9-17-98, 1-15-07, 2-5-13, \_\_\_\_\_.*

***Comment:*** *Adds (4) to provide that specifically-named persons who are the subject of the agency’s proposed action may become a party to the proceeding by entering an appearance as a respondent and describing how their substantial interests are being determined. (Similar to former Rule 28-106.205(3) and referenced in amended Rule 28-106.205(4)). Examples of such specifically-named persons include the successful*

*competing applicant or bidder named in the agency's notice of decision or intended decision that is the subject of a petition for hearing. Provides that such party may raise issues in support of the agency's determination or defenses to the allegations in the petition.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.204 Motions.**

(1) through (2) No change.

(3) All motions, other than a motion to dismiss, shall include a statement that the movant has conferred with all other parties of record and shall state as to each party whether the party has any objection to the motion and whether any party intends to file a response to the motion. Any statement that the movant was unable to contact the other party or parties before filing the motion must provide information regarding the date(s) and method(s) by which contact was attempted.

(4) No change.

*Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History—New 4-1-97, Amended 1-15-07, 2-5-13, \_\_\_\_\_.*

***Comment:*** *Requires parties to indicate in a motion whether any party intends to file a response so that the presiding officer will know whether to wait for the time allowed for a response to elapse before ruling on the motion.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.205 Intervention; Appearances by Specifically-Named Persons**

(1) Persons other than the original parties to a pending proceeding whose substantial interest will be affected by the proceeding and who desire to become parties may move the presiding officer for leave to intervene. Except for good cause shown, motions for leave to intervene must be filed at least 20 days before the final hearing unless otherwise provided by law. The parties may, within 7 days of service of the motion, file a response in opposition. The presiding officer may impose terms and conditions on the intervenor to limit prejudice to other parties.

(2) The motion to intervene shall contain the following information:

(a) The name, address, e-mail address, telephone number, and any facsimile number of the intervenor, if the intervenor is not represented by an attorney or qualified representative; and

(b) The name, address, e-mail address, telephone number, and any facsimile number of the intervenor's attorney or qualified representative; and

(c) Allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to agency rule, or that the substantial interests of the intervenor are subject to determination or will be affected by the proceeding; and

(d) A statement as to whether the intervenor supports or opposes the preliminary agency action; and

(e) If the intervenor seeks to raise new issues, the information required by Rule 28-106.201(2)(c)-(g); and

(e) The statement required by subsection 28-106.204(3); and

(fg) The signature of the intervenor or intervenor's attorney or qualified representative; and

(gh) The date.

(3) The intervention shall be in subordination to, and in recognition of, the main proceeding, unless otherwise ordered by the presiding officer in their discretion.

(3)(4) Specifically-named persons, whose substantial interests are being determined in the proceeding, may become a party by entering an appearance as a named party in the manner described in Rule 28-106.201(4) and need not request leave to intervene.

*Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History—New 4-1-97, Amended 1-15-07, 2-5-13, \_\_\_\_\_.*

***Comment:*** *Requires an intervenor who seeks to raise new issues to also include the information required by Rule 28-106.201(2)(c)-(g) (prescribing contents of petition). Consistent with case law, provides that intervention is in subordination to, and in recognition of, the main proceeding, unless otherwise ordered by the presiding officer. Revises (3) (now (4)) to reference the process by which a specifically-named person may become a party—as opposed to an intervenor. See Rule 28-106.201(4).*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.2115 Motions to Disqualify.**

(1) Any party may request the disqualification of an administrative law judge by filing with the Division of Administrative Hearings, prior to the taking of evidence at a hearing, a motion to disqualify accompanied by an affidavit stating the grounds with particularity.

(2) The motion must be in writing and specifically allege the facts and reasons upon which the movant relies as grounds for disqualification. The affidavit must allege a well-founded fear that the movant will not receive a fair hearing before the administrative law judge because of the prejudice of the administrative law judge against the affiant or in favor of an adverse party, and the reasons for such fear; that the administrative law judge is related to an attorney or counselor of record in the cause by consanguinity or affinity within the third degree; or that the administrative law judge is a material witness for or against one of the parties to the cause.

(3) The motion must also include the dates of all previously granted motions to disqualify in the case and the dates of the orders ruling on such motions.

(4) Determination: Initial and Successive Motions.

(a) The administrative law judge against whom an initial motion to disqualify is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the administrative law judge shall immediately enter an order granting disqualification and the case shall be transferred to another administrative law judge. If the motion is legally insufficient, the administrative law judge shall enter an order denying the motion. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

(b) If an administrative law judge has been disqualified previously on a motion for alleged prejudice or partiality, a successor administrative law judge shall not be disqualified based on a successive motion by the same party unless the successor administrative law judge rules that he or she is in fact not fair or impartial in the case. A successor judge may rule on the truth of the facts alleged in support of the motion.

(5) Any motion to disqualify shall be ruled on immediately, but in no event more than 15 days after filing of the motion. Any motion not ruled upon after 15 days will be deemed granted.

Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5), 120.569(2)(a) FS. History - New \_\_\_\_\_.

***Comment:*** *Codifies the process to be used and the standards for evaluating a motion to disqualify a presiding officer. The text generally mirrors that of the Rules for Judicial Administration so that case law referencing and applying those Rules can be instructive. The changes to the text are designed solely to adjust the process to comport with the timeframe in Section 120.569(2)(a) and are not intended to be substantive.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.213 Evidence.**

(1) through (4) No change.

(5) If requested, and if the necessary equipment is reasonably available, the presiding officer may enter an order allowing testimony ~~may~~ to be taken by means of video teleconference or by telephone.

(a) No change.

(b) Except in cases of emergency, any party seeking to offer testimony by telephone in their case in chief must file a motion for leave to do so with the presiding officer at least five days prior to the date noticed for the hearing. For any testimony taken by telephone, a notary public must be physically present with the witness to administer the oath. The notary public shall provide a written certification to be filed with the presiding officer confirming the identity of the witness, and confirming the affirmation or oath by the witness. It shall be the responsibility of the party calling the witness to secure the services of a notary public and to file the written certification with the presiding officer.

(6) No change.

Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History—New 4-1-97, Amended 1-15-07, 2-5-13, \_\_\_\_\_.

***Comment:*** *Clarifies that an order must be obtained to permit testimony by telephone or video teleconference, and requires a party seeking to offer testimony by telephone to request leave from the presiding officer at least five days prior to the day noticed for hearing.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.214 Recordation; Translator or Interpreter.**

(1) through (2) No change.

(3) No later than 7 days prior to any hearing, a party who needs a translator or interpreter in order to testify, present or understand evidence, or otherwise fully participate in the hearing, shall give notice to all other parties. This notice shall include the name of the translator or interpreter the party intends to use, contact information for the translator or interpreter, the nature of the translation or interpretation services needed, and a disclosure of the relationship, if any, of the translator or interpreter to the person for whom translation or interpretation services will be provided. This notice shall be served on each party or the party's representative at the address of record. If the address of record includes an e-mail address, then service shall be made by e-mail.



Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History–New 4-1-97, Amended 3-18-98, \_\_\_\_\_.

**Comment:** Establishes a procedure for the use of interpreters and translators.

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.217 Exceptions and Responses.**

(1) No change.

(2) Exceptions and responses thereto shall be served in accordance with Rule 28-106.110 provided to all parties by facsimile or electronic mail, if a facsimile number or e-mail address has been provided number or address provided, the same day they are filed with the agency.

(3) No change.

Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History–New 4-1-97, Amended 1-15-07, 2-5-13, \_\_\_\_\_.

**Comment:** Amended for consistency with amended Rule 28-106.110. No intended change to existing rule requirements.

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.3015 Amendment of Petitions.**

(1) A petition may be amended prior to the designation of the presiding officer by filing and serving an amended petition in the manner prescribed for filing and serving an original petition. Thereafter the petition may be amended only upon order of the presiding officer.

(2) If an administrative law judge determines that no genuine issue as to any material fact remains in a proceeding brought under Section 120.57(1), and enters an order relinquishing jurisdiction to the agency, the party that initiated the proceeding may amend their petition to comply with Rule 28-106.301(2) without leave of the presiding officer. The amended petition must be filed no later than 14 days after entry of the order relinquishing jurisdiction and shall not raise any issues of disputed fact that could have been raised before the administrative law judge.

Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History–New \_\_\_\_\_.

**Comment:** Establishes procedures for the amendment of petitions, consistent with Rule 28-106.202. Allows a party to amend a petition for hearing without leave to comply with the requirements for initiating an informal proceeding following an order determining the absence of material fact and relinquishing jurisdiction.

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.3016 Intervention.; Appearances by Specifically-Named Persons.**

(1) Persons other than the original parties to a pending proceeding whose substantial interest will be affected by the proceeding and who desire to become parties may move the presiding officer for leave to intervene. The parties may, within 7 days of service of the motion, file a response in opposition. The presiding officer may impose terms and conditions on the intervenor to limit prejudice to other parties.

(2) The motion to intervene shall contain the following information:

(a) The name, address, e-mail address, telephone number, and any facsimile number of the intervenor, if the intervenor is not represented by an attorney or qualified representative;

(b) The name, address, e-mail address, telephone number, and any facsimile number of the intervenor's attorney or qualified representative;

(c) Allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to agency rule, or that the substantial interests of the intervenor are subject to determination or will be affected by the proceeding;

(d) A statement as to whether the intervenor supports or opposes the preliminary agency action;

(e) If the intervenor seeks to raise new issues, the information required by Rule 28-106.301(d)-(g);

(f) The statement required by Rule 28-106.303(2);

(g) The signature of the intervenor or intervenor's attorney or qualified representative;  
and

(h) The date.

(3) Other than parties to the original proceeding, specifically-named persons who are the subject of the agency's proposed action may become a party to the proceeding by entering an appearance as a respondent and identifying how their substantial interests are being determined. Such named party respondent shall be entitled to raise issues in support of the agency's determination or defenses to the allegations in the petition.

Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History--New

**Comment:** Establishes procedures for intervention, in proceedings not involving disputed facts, generally consistent with the procedures in Rule 28-106.205.

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.302 Notice of Proceeding.**

(1) After receipt of a petition determined to be in substantial compliance with this Rule and which raises no issues of disputed material fact, the agency shall serve a written notice on all parties that includes:

(a) The opportunity to submit written evidence; and

(b) The opportunity to request a hearing before the agency.

(2) The notice shall provide the parties allowing at least 14 days from the date of the notice for the parties to provide material file written evidence in support of or opposition to the agency action or refusal to act or in aggravation or mitigation of any penalty which may be imposed. The notice shall also provide the parties at least 7 days to file written evidence in response to written evidence filed by another party. No further written evidence may be submitted without first obtaining leave of the agency. any "Written evidence" includes documents, memoranda of law, or and all other written material. in support of or opposition to the agency action or refusal to act or in aggravation or mitigation of any penalty which may be imposed. If only written evidence is submitted, the notice shall provide the parties at least 7 that all other parties shall have 14 days to file respond in

~~writing to that written evidence.~~

(23) The notice shall provide the parties at least 14 days to file a request for a hearing before the agency. The agency may schedule an informal hearing with or without such a request on the matter for the purpose of taking oral evidence or argument. If it does so, the agency shall serve written notice at least 14 days prior to the hearing, setting forth the place, date, time of the hearing, and legal authority and jurisdiction under which the hearing is to be held.

*Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5), 120.57(2) FS. History—New 4-1-97, Amended 3-18-98, 12-24-07, \_\_\_\_\_.*

***Comment:*** *Conforms rule to more closely align with the requirements of Section 120.57(2).*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.303 Motions.**

(1) All requests for relief shall be by motion. All motions shall be in writing unless made on the record during a hearing and shall fully state the action requested and the grounds relied upon. The original motion shall be filed with the presiding officer. When time allows, the other parties may, within ~~seven~~7 days of service of a written motion, file a response in opposition. No reply to the response shall be permitted unless leave is sought from and given by the presiding officer. Written motions will normally be disposed of after the response period has expired, based on the motion, together with any supporting or opposing memoranda. The presiding officer shall conduct proceedings and enter such orders as are deemed necessary to dispose of issues raised by the motion.

(2) All motions, other than a motion to dismiss, shall include a statement that the movant has conferred with all other parties of record and shall state whether any party has an objection to the motion and whether any party intends to file a response to the motion.

(3) Motions for extension of time shall be filed prior to the expiration of the deadline sought to be extended and shall state good cause for the request.

*Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History—New 4-1-97, Amended 2-5-13, \_\_\_\_\_.*

***Comment:*** *Requires parties to indicate in a motion whether any party intends to file a response to that the presiding officer will know whether to wait the time allowed for a response to elapse before ruling on the motion.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.304 Continuances.**

The presiding officer may grant a continuance of a hearing for good cause shown. Except in cases of emergency, requests for continuance must be made at least five days prior to the date noticed for the hearing.

*Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History—New 4-1-97.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.3045 Discovery**

After commencement of a proceeding, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure. The presiding officer may issue appropriate orders to effectuate the purposes of discovery

and to prevent delay, including the imposition of sanctions, except contempt, in accordance with the Florida Rules of Civil Procedure.

Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History–New

**Comment:** Codifies the discovery procedures to clarify that discovery is available in proceedings not involving disputed facts.

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.305 Conduct of Proceedings.**

The presiding officer before whom a proceeding ~~case~~ is pending may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the ~~case, including bifurcating the proceeding.~~  
Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History–New 4-1-97, Amended 1-15-07, \_\_\_\_\_.

**Comment:** Minor editorial changes for clarity and consistency with nature of proceedings not involving disputed facts.

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.306 Recordation; Translator or Interpreter.**

~~(1) Responsibility for preserving the testimony at final hearings shall be that of the~~ (1) The agency responsible for taking final agency action. Proceedings shall ensure that any final hearing shall be is recorded by a certified court reporter or by recording instruments. The agency shall serve on all parties written notice of the method of recordation not later than 7 days before the scheduled commencement of the hearing.

(2) Any party to a proceeding ~~hearing~~ may, at its own expense, provide a certified court reporter for a hearing if the agency does not. The presiding officer may provide a certified court reporter. At hearings reported by a court reporter, any party who wishes a transcript of the testimony shall order the same at its own expense. If a court reporter records the proceedings, the recordation shall become the official transcript.

(3) No later than 7 days prior to any hearing, a party who needs a translator or interpreter in order to testify, present or understand evidence, or otherwise fully participate in the hearing shall give notice to all other parties. This notice shall include the name of the translator or interpreter the party intends to use, contact information for the translator or interpreter, the nature of the translation or interpretation services needed, and a disclosure of the relationship, if any, of the translator or interpreter to the person for whom translation or interpretation services will be provided. This notice shall be served on each party or the party's representative at the last address of record. If the address of record includes an e-mail address, then service shall be made by e-mail

Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History–New 4-1-97, Amended 3-18-98, \_\_\_\_\_.

**Comment:** Requires a notice of recordation in a manner consistent Rule 28-106.214.

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-106.307 Post-Hearing Submittals.**

~~The presiding officer may permit all parties to submit proposed findings of fact, conclusions of law, orders, and memoranda on the issues within a time designated by the~~

~~presiding officer. Unless authorized by the presiding officer, proposed orders shall be limited to 40 pages.~~

~~Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History New 4-1-97, Repealed \_\_\_\_\_.~~

~~**Comment:** Repealed for lack of a law to implement. The statutory authority for proposed findings of facts and orders is found only in Section 120.57(1)(b).~~

THE FULL TEXT OF THE PROPOSED RULE IS:

**~~28-106.501 Emergency Action.~~**

~~(1) If the agency finds that immediate serious danger to the public health, safety, or welfare requires emergency action, the agency shall enter an emergency order summarily suspending, limiting, or restricting a license, or taking such other emergency action as is authorized by law.~~

~~(2) The agency's emergency order shall include a notice of the licensee's (or person or entity subject to the agency's jurisdiction) right to an immediate appeal of the emergency final order pursuant to Section 120.569(2)(n) or 120.60(6), F.S.~~

~~(3) In the case of the emergency suspension, limitation, or restriction of a license, unless otherwise provided by law, within 20 days after emergency action taken pursuant to section (1) of this rule, the agency shall initiate emergency proceedings in compliance with sections 120.569, 120.57 and 120.60, F.S., and Rule 28-106.2015, F.A.C.~~

~~Rulemaking Authority 14.202, 120.54(5), FS. Law Implemented 120.54(5) History – New 1-15-07, Amended 12-24-07, Repealed \_\_\_\_\_.~~

~~**Comment:** Repealed because it is substantially similar to Section 120.60(6), F.S., and because it does not have statutory authority.~~

THE FULL TEXT OF THE PROPOSED RULE IS:

**~~28-110.002 Definitions.~~**

For purposes of this subchapter, the following terms mean:

~~(1) "Contract procurement process" has the same meaning as "contract solicitation or award process" as used in Section 120.57(3), F.S. This includes procurements by invitation to bid (ITB), request for proposal (RFP), or invitation to negotiate (ITN), as each is defined in Section 287.012, F.S., approval of a single source procurement, as defined in Section 287.057(5)(3)(c), F.S., or other solicitation documents as permitted by law.~~

~~(2) No Change~~

~~(3) "Competitive solicitation" or "solicitation" shall have the meaning ascribed in Section 287.012(97)(6), F.S.~~

~~(4) "Electronic posting" shall have the meaning ascribed in Section 287.012(11)(10), F.S.~~

~~Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.57(5) FS. History–New 4-1-97, Amended 1-15-07, \_\_\_\_\_.~~

~~**Comment:** Updates statutory citations.~~

THE FULL TEXT OF THE PROPOSED RULE IS:

**~~28-110.003 Notice of Protest.~~**

~~(1) A notice of protest shall be addressed to the agency clerk of the agency office that issued the solicitation or made any other decision that is intended to be protested; shall~~

identify the solicitation by number and title or any other language that will enable the agency to identify it; and shall state that the person intends to protest the decision. If a bond is required, it shall not be filed with the notice unless otherwise required by law.

(2) The notice of protest must be filed with the agency clerk unless otherwise designated by the solicitation. A notice of protest shall not be filed before the 72-hour period begins. The 72-hour period begins upon electronic posting of a decision or intended decision. The notice of protest must be received by the agency before the 72-hour period expires. ~~The notice of protest must be filed with the agency clerk unless otherwise designated by the solicitation.~~

(3) No change.

*Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.57(5) FS. History—New 4-1-97, Amended 1-15-07, \_\_\_\_\_.*

***Comment:*** *Addresses inconsistent references in (1) and (2) to clarify that notice of protest is filed with the agency clerk, unless otherwise designated by the solicitation.*

THE FULL TEXT OF THE PROPOSED RULE IS:

**28-110.005 Bond.**

(1) Bid protest bonds are required by Section 287.042(2)(c), F.S., for procurements under Chapter 287 (commodities, contractual services, professional services and insurance) and by Section 255.25(3)~~(e)~~(d), F.S., for procurements of leases of space in privately owned buildings. Bonds are not required for protests involving building construction projects undertaken pursuant to Chapter 255, except that Section 255.0516, F.S., authorizes school boards, community college boards of trustees and a state university board of trustees to require bonds under some circumstances. Bonds are also required by Section 337.11(5)(a), F.S., for certain procurements by the Department of Transportation.

(2) Bonds required by Section 337.11(5)(a), F.S., must be filed with the notice of protest. Other bonds are not to be filed with the notice of protest, but must be filed at the time of filing with the formal written protest ~~or within the 10-day period allowed for filing the formal written protest.~~ The bond must accompany a protest filed pursuant to Section 24.109(2)(a), F.S. A bond can be in substantially the following form:

STATE OF FLORIDA ~~ADMINISTRATION COMMISSION~~ PROCUREMENT  
PROTEST BOND

Bond Number: \_\_\_\_\_  
Contract Number: \_\_\_\_\_

KNOW ALL PERSONS BY THESE PRESENTS:

That we, \_\_\_\_\_ a (mark one) [ ] corporation, [ ] partnership, [ ] proprietorship, organized and existing under the laws of the State of \_\_\_\_\_, and having its principal place of business at \_\_\_\_\_, as PRINCIPAL; and \_\_\_\_\_, a surety company, organized under the laws of the State of \_\_\_\_\_, and duly authorized to do business in the State of Florida, whose principal place of business is \_\_\_\_\_, as SURETY, are held and firmly bound unto the STATE OF FLORIDA,

\_\_\_\_\_ (Agency), as OBLIGEE, in the amount of \$\_\_\_\_\_ for the payment of which sum we, as Principal and Surety, bind ourselves, our heirs, personal representatives, successors and assigns, jointly and severally.

THIS BOND is issued under the provisions of \_\_\_\_\_ Florida Statutes. The above-named Principal has initiated an administrative protest regarding the Obligee's decision or intended decision pertaining to ~~(mark one) [ ]~~ Bid Number \_\_\_\_\_ ~~[ ]~~ an agency's request for approval of an exceptional purchase of \_\_\_\_\_ submitted by \_\_\_\_\_. Said protest is conditioned upon the posting of a bond at the time of filing the formal written protest.

NOW, THEREFORE, the condition of this Bond is that if the Principal, after the administrative hearing process and/or any appellate court proceedings regarding the protest, shall satisfy all costs and charges allowed by final order and/or judgment, and interest thereon, in the event the Obligee prevails, then the obligation shall be null and void; otherwise it shall remain in full force and effect.

The Obligee may bring an action in a court of competent jurisdiction on this bond for the amount of such liability, including all costs and attorneys' fees.

PRINCIPAL: \_\_\_\_\_  
BY: \_\_\_\_\_  
Title: \_\_\_\_\_ (CORPORATE SEAL)  
ATTEST: \_\_\_\_\_  
\_\_\_\_\_

SURETY: \_\_\_\_\_  
BY: \_\_\_\_\_  
Title: \_\_\_\_\_ (CORPORATE SEAL)  
Florida Resident Agent: \_\_\_\_\_

(Note: Power of Attorney showing authority of Surety's agent or Attorney in Fact must be attached).

Bonds must be countersigned by an agent licensed in Florida. Section 287.042(2)(c), F.S., authorizes a cashier's check or money order in lieu of a bond, for procurements governed by Chapter 287, F.S.

(3) No change.

(4) If, at the conclusion of the proceeding and any appellate proceedings, the petitioner prevails, the agency shall return the bond, cashier's check or money order to the petitioner. If the agency prevails but the petitioner is not ordered to pay costs, the agency shall return the bond or alternate security to the petitioner. If the petitioner is ordered to pay costs, the agency shall return the bond or alternate security as provided by Section 255.25(3)(~~e~~)(d), 287.042(2)(c) or 337.11(5)(b), F.S. The entire bond may be forfeited if circumstances warrant under Section 337.11(5)(a), F.S.

*Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History—New*

*4-1-97, Joint Administrative Procedures Committee Objection Filed – See FAW Vol. 24, No. 20, May 15, 1998, Amended 1-15-07, Joint Administrative Procedures Committee objection resolved by Chapter 2006-82, Laws of Florida, Florida Administrative Weekly Vol. 35, No. 27, July 10, 2009, \_\_\_\_\_.*

**Comment:** *Clarifies that a protest bond is due at the time of filing a formal written protest, pursuant to Section 287.042(2)(c), F.S. Simplifies protest bond form and removes reference to exceptional purchases, which are uncommon. Updates statutory citations.*



# Appendix

# **Summary of Proposed Amendments to Uniform Rules of Procedure**

**Shaw Stiller**

**SUMMARY OF PROPOSED AMENDMENTS TO  
UNIFORM RULES OF PROCEDURE  
Shaw Stiller**

As amended by Chapter 97-176, Laws of Florida, the Administrative Procedure Act directs the Administration Commission – the Governor and Cabinet -- to adopt one or more sets of uniform rules of procedure to govern agency conduct. See § 120.54(5)(a)1., Fla. Stat. Like the statutory chapter they implement, the uniform rules must by definition establish one *procedure* – singular, not plural. All agencies subject to Chapter 120 must comply with these uniform rules unless granted an exception by the Administration Commission. See § 120.54(5)(a), Fla. Stat.; Gaston v. Dep't of Revenue, 742 So. 2d 517, 521 (Fla. 1<sup>st</sup> DCA 1999).

The Administration Commission adopted the original uniform rules of procedure on April 1, 1997, as Chapters 28-101 through 28-110 and 28-112, Florida Administrative Code.<sup>1</sup> As of that date, any existing, agency-specific rules or practices inconsistent with the uniform rules were subject to an automatic “legislative repeal” by operation of Section 120.545(5)(a), Florida Statutes. Dep't of Corr. v. Saulter, 742 So. 2d 368, 370 (Fla. 1<sup>st</sup> DCA 1999); see Madison Highlands, LLC v. Fla. Hous. Fin. Corp., 220 So. 3d 467, 471 (Fla. 1<sup>st</sup> DCA 2017) (“a rule cannot serve as an exception to the Uniform Rules because the Administration Commission has not approved it as an exception”).

The uniform rules have been amended several times in the twenty-three years since their adoption, with the most recent changes being accomplished in 2013. Several agencies have applied for and been granted exceptions to the uniform rules. See, e.g., Fla. Admin. Code Rr. 25-40.001 (Public Service Commission) and 40E-0.101 (South Florida Water Management District).

The recommendations for the 2013 changes to the uniform rules were initially developed by an ad hoc committee from the Administrative Law Section of the Florida Bar. The committee recommendations were presented to and approved by the Executive Council before consideration and adoption under Chapter 120 by the Administration Commission.

In 2019, an ad hoc committee of the Administrative Law Section was again convened to review the uniform rules and determine whether six years of experience, administrative proceedings, changes in laws and rules, and judicial review illuminated any opportunities for improvement. The following are the 2019 ad hoc committee members:

Administrative Law Judge Yolanda Green  
Administrative Law Judge Elizabeth McArthur\*  
Administrative Law Judge Li Nelson\*  
Administrative Law Judge David Watkins  
Larry Sellers, Chair\*

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<sup>1</sup> Chapter 28-111 relating to Court Costs for Court Facilities was adopted separately in April 1998 and repealed in June 2012.

Paul Drake, Reporter  
Seann Frazier  
Shaw Stiller\*

\*Also served on the 2013 ad hoc committee.

The Committee's work included some 13 meetings over 15 months. It benefited greatly from numerous public comments. The Committee initially solicited suggestions and then developed several drafts that were distributed for comment, including drafts dated June 18, September 18 and November 4—all of which were posted on the Section web site. The Committee also directly requested solicited input from the Administrative Law Judges of the Division of Administrative Hearings, the Administrative Law Section, the Florida Government General Counsels' Association, the Florida Government Bar Association, and the Environmental and Land Use Law Section. The Chair of the ad hoc committee presented the Executive Council of the Administrative Law Section updates on the committee's progress and proposed rule revisions in June and November, 2019.

Following this second report, the Committee solicited and evaluated additional comments and issued yet another draft for comment, dated January 31, 2020. The Committee received several new comments and issued its recommended changes, dated April 27, 2020.

## **CHAPTER 28-101 ORGANIZATION**

### **Rule 28-101.001: Statement of Agency Organization and Operation**

The existing rule provides that the Statement of Agency Organization and Operation must inform the public “whether” documents can be filed by facsimile or e-mail. The ad hoc committee has proposed that the rule be amended to require that the Statement “describe the manner” by which documents can be filed by facsimile or e-mail. Notably, existing uniform rules require that the Statement contain the name and e-mail address for the agency clerk and include a statement that “filing shall mean received by the office of the agency clerk during normal business hours . . . .” Fla. Admin. Code rr. 28-101.001(2)(d) & 28-106.104(1).

If this proposed amendment is adopted, an agency wishing to retain or adopt a practice of not accepting documents for filing by e-mail or facsimile could apply for an exception.

The ad hoc committee received several comments from agencies highlighting the differences in cost and complexity between electronic filing and submitting documents by e-mail. The proposed amendments to this rule recognize this difference and leave to each agency the decision on whether to accept electronic filings.

The proposed amendments would also require the Statement to list the holidays and other days on which the agency will be closed and the manner the agency will use to notify the public of unscheduled agency closures. A separate proposed amendment to Rule 28-106.103, discussed

below, would place “any other days on which the agency clerk’s office is closed” in the same calendar category as Saturdays and Sundays for purposes of calculating deadlines.

Finally, the proposed rule would include a provision for an annual review and update of the Statement.

## **CHAPTER 28-105 DECLARATORY STATEMENTS**

### **Rule 28-105.0027: Intervention**

Neither the current rule nor its predecessor<sup>2</sup> contain an express allowance for a party granted intervenor status in a declaratory statement proceeding to submit any written filing other than a petition to intervene. Even without express allowance, agencies have accepted and considered responses filed by intervenors in the course of issuing declaratory statements. See, e.g., In re: Petition for Declaratory Statement of Seascope of Little Hickory Island, Final Order No. DS19-044 (Dept. Bus. Prof. Reg. Dec. 10, 2019); In re: Petition for Declaratory Statement by the Town of Indian River Shores, Final Order No. PSC-16-0093-FOF-EU (Public Serv. Comm. Jan. 5, 2016).

The committee has proposed a revision to the rule to provide a person granted intervenor status the right to file a response to the petition for declaratory statement within seven days of being granted intervention or within a longer period if specified by the presiding officer. No reply may be filed absent leave granted by the presiding officer.

The remaining revisions to this rule are editorial and non-substantive.

### **Rule 28-105.003: Agency Disposition**

The one amendment to this rule eliminates unnecessary language regarding the duty of collegial bodies to take action only at duly noticed public meetings.

## **CHAPTER 28-106 DECISIONS DETERMINING SUBSTANTIAL INTERESTS**

### **PART I: GENERAL PROVISIONS**

#### **Rule 28-106.103: Computation of Time**

The amendment to this rule proposes to place “any other days on which the agency clerk’s office is closed” in the same calendar category as Saturdays and Sundays. Deadlines that fall on such days would be extended until the next day on which the agency clerk’s office is open, and those days would not be included in computing periods of time less than 7 days.

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<sup>2</sup> Fla. Admin. Code r. 28-4 (repealed June 10, 1998).

### **Rule 28-106.104: Filing**

The proposed amendment to Rule 28-106.104 would add a requirement that every pleading submitted by a Florida attorney in a Chapter 120 proceeding include the attorney's bar number. Florida Rule of Judicial Administration 2.515(a), which contains the familiar requirement that an attorney's Florida Bar number be included on "[e]very pleading and other paper of a party represented by an attorney," applies only to filings in the courts of the state and not to those made with agencies. While many attorneys currently include their Florida Bar number on administrative pleadings, a practice which allows an Administrative Law Judge to efficiently determine whether the party is represented by counsel or a proposed qualified representative, the proposed amendment would make this inclusion a uniform requirement.

The amendments would add a provision requiring any pleading to have consecutively numbered pages.

The other changes to this rule relocate some language to Rule 28-106.110, "Service of Papers," in order to promote a more clear understanding of how pleadings subsequent to the initial submission are to be served by the parties.

### **Rule 28-106.105: Appearances**

The current rule allows a potential qualified representative to file a request for hearing on behalf of a party and then file the written request for qualification as a representative at a future time "as soon as practicable, but not later than any pleading filed by the person seeking to appear on behalf of the party." The proposed amendment to this rule would require the party on whose behalf a qualified representative files an initial request for hearing to file the appropriate papers for qualification of the representative under Rule 28-106.106 not later than 7 days after assignment of the presiding officer.

### **Rule 28-106.106: Appearances**

With few exceptions,<sup>3</sup> every non-attorney who represents a party before a state agency must file for and be approved as a qualified representative to act in that capacity. The proposed amendments to the uniform rules were drafted to provide clarity to this process.

The statutory authority for representation by a non-attorney in administrative proceedings is found in section 120.57(1)(b), Florida Statutes, which provides that all parties have the right "to

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<sup>3</sup> One exception to this general rule is found in Section 447.609, Florida Statutes, which allows certain persons to represent a defined type of party in proceedings before the Public Employees Relations Commission. See Fla. Pub. Employees Council 79, AFSCME, AFL-CIO v. Jacksonville Employees Together, 738 So. 2d 489, 491 (Fla. 1<sup>st</sup> DCA 1999) ("such [qualified representative] criteria do not pertain to a 'full-time employee or officer of any public employer or employee organization' under section 447.609").

be represented by counsel or other qualified representative.” The proposed rule amendments clarify that counsel means a member of the Florida Bar *in good standing* and add, for the first time, a definition of “qualified representative.”

The rule is also proposed to include a provision noting that an attorney licensed to practice in one or more jurisdictions other than Florida must file a request to appear as a qualified representative. This amendment is consistent with current agency interpretation and application of Chapter 120. See, e.g., Amelia Tree Conservancy, Inc. v. City of Fernandina Beach, 2019 WL 4572118, at \*2 (DOAH Case No. 19-2515), Final Order No. 19-201 (Dept. Economic Opp. Oct. 18, 2019); Lessinger v. Office of Financial Reg., 2009 WL 642003, at \*3 (DOAH Case No. 08-3102), Final Order No. 0370-S-9/07 (Office of Financial Reg. Jan. 30, 2009).

When the qualified representative does not file the initial pleading but a party subsequently wishes such representation, the current rule requirement that the party must file the request “as soon as practicable, but no later than any pleading filed by the person seeking to appear on behalf of the party” would continue to apply.

One of the required elements of a request for a qualified representative is an affidavit sworn to by the representative setting forth their qualifications. If the affidavit does not sufficiently set forth the representative’s qualifications, the presiding officer may summarily deny the request. See Medina v. Vecellio and Grogan, Inc., DOAH Case No. 15-5548, Order Denying Motion/Request for Leave to be Represented by a Qualified Representative in this Case (Div. Admin. Hrgs. May 2, 2016).

The amendments add five content requirements to the representative’s sworn affidavit:

1. A list of all proceedings in the past two years in which the representative has been granted or denied authorization as a representative.
2. A statement as to whether the representative has been denied admission to the Florida Bar or the bar of any other jurisdiction.
3. A statement that the representative has read and will comply with Chapter 120 and the Uniform Rules of Procedure.
4. A statement that the representative has read and has knowledge of the Florida Rules of Civil Procedure relating to discovery in an administrative proceeding.
5. A statement that the representative has read and has knowledge of the Florida Rules of Evidence, including the concept of hearsay in an administrative hearing.
6. A statement that the representative is knowledgeable regarding the factual and legal issues involved in the proceedings

Requirements four through six in this list appear in the existing rule as matters to be considered by the presiding officer but not as content requirements for the affidavit. Fla. Admin. Code r. 28-106.106(3)(b)-(c). The committee recommendation would address this apparent incongruity.

The first three matters listed above are not in the current rule as affidavit requirements or matters to be considered by the presiding officer. This information is included for consideration by the presiding officer. Neither the current rule nor the proposed amendments provide for automatic disqualification or specify any other treatment based on a specific response.

If the proposed representative is a lawyer but not a member of the Florida Bar, that person must also include in their affidavit a list of jurisdictions in which they are licensed to practice and a certification that they (1) have not been disbarred, (2) have not resigned in lieu of discipline, (3) are not inactive due to incapacity, and (4) are not currently suspended as a disciplinary sanction from practice in any jurisdiction. A lawyer meeting any one of those four criteria would be disqualified from representing a party in an administrative proceeding. This list is an expansion of the current rule, which provides only one automatic disqualifying criteria for a non-Florida attorney seeking to be a qualified representative (being disbarred in another jurisdiction).

#### **Rule 28-106.107: Standard of Conduct for Qualified Representatives**

The amendment to this rule would add compliance with Chapter 120, the Uniform Rules of Procedure, and “all other applicable statutes and rules” to the code of conduct for qualified representatives.

#### **Rule 28-106.110: Service of Papers**

The primary purpose of the “strike all” of this rule is to consolidate as many provisions and revisions as practicable into one rule which will govern all service in administrative proceedings unless another method is expressly required by another law, such as Section 120.60(5) or 766.303, Florida Statutes. There are several proposed amendments to the current method for service.

1. E-mail service is mandatory if the both filer’s and recipient’s address of record includes an e-mail address.<sup>4</sup>
2. E-mail service made after 5:00 p.m. is deemed service as of 8:00 a.m. the following day.
3. Filings must be accompanied by a certificate of service.
4. If the certificate of service is in the form prescribed in the rule, the certificate is prima facie evidence of service in compliance with the rule.

These revisions bring service in administrative proceedings more into line with the service in the courts of this state under Rule 2.516, Florida Rules of Judicial Administration.

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<sup>4</sup> Pursuant to Rule 28-106.104(2)(d), all filings with the agency are required to include “any e-mail address . . . of the person filing the pleading.” The combination of this existing rule requirement and the proposed amendment would make service by any means other than e-mail the rare exception.



Please be mindful that parties, attorneys, and qualified representatives are responsible for serving documents and pleadings, and that no courtesy function of the Division of Administrative Hearings or its website relieves anyone of that duty.

### **Rule 28-106.111: Point of Entry into Proceedings and Mediation**

Section 120.569(1) provides mandatory minimum contents for an agency's notice of rights. The agency's notice must inform the reader as to whether an administrative hearing is available, explain the procedure for obtaining a hearing, and state the time limits that apply. The existing rule echoes the statute and the above requirements, adding only that the notice must advise persons of certain mediation rights.

The existing uniform rule authorizes a person to file a motion for an extension of time to file a petition or request for hearing so long as they file the motion with the agency within the time required for the initial pleading. However, the rule does not require the agency to advise the public of this opportunity in the notice of rights.

The statute being implemented provides that the agency notice "shall state the time limits which apply" to filing a request for hearing. An extension directly affects time limits.<sup>5</sup> Accordingly, the committee has proposed that the rule be amended to require the notice of rights to advise that a person may request an extension time and that such a request must state good cause shown for the extension.

To ensure internal consistency with the proposed amendments to Rule 28-101.001, amendments to this rule are also proposed to require the notice of rights to include instructions on filing by e-mail or fax and, if applicable, instructions on how to electronically file documents.

## **PART II: HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT**

### **Rule 28-106.201: Initiation of Proceedings**

The committee proposes an amendment to this rule to add a new subsection (4), which would provide that specifically-named persons who are the subject of the agency's proposed action may become a party to the proceeding by entering an appearance as a respondent and identifying how their substantial interests will be affected rather than filing a petition or request for hearing.

Examples of such a specifically-named persons include the successful bidder or permit applicant named in the agency's notice or intended notice of decision. That person would generally have no sufficient reason to file a petition or request for hearing regarding a successful bid or application but would likely realize an impact to their substantial interests if a petition is filed by

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<sup>5</sup> In Long Bar Point, LLP v. Lake Flores I, LLC, Petitioners timely filed for and the District granted two thirty day extensions of time to file a request for hearing regarding intended agency action to issue a surface water management permit. DOAH Case No. 17-5609, Final Order No. SWF 20-005 (SFWMF Feb. 25, 2020). Petitioners filed a request for hearing within the second extension period and the District referred it to DOAH, stating in the referral letter that "[t]he District has determined that the request is timely."

another party to contest the notice or intended notice. Under the proposed amendments, that person could enter an appearance, become a party to the proceeding as a respondent, and raise issues in support of the agency's determination or defenses to issues raised in a petition.

#### **Rule 28-106.204: Motions**

A proposed amendment to this rule would require a moving party to indicate in her or his motion whether another party intends to file a written response. The current rule requires only that the moving party indicate whether another party has any objection. Whether another party objects or not, the presiding officer can more expeditiously enter a ruling on the motion if timely informed that no response will be filed.

#### **Rule 28-106.205: Intervention**

The existing rule contains the content requirements for a motion to intervene. One proposed amendment to this rule would require an intervenor seeking to raise new issues to include in the motion to intervene additional information akin to a petition or request for hearing, including a statement of all disputed issues of material fact, a concise statement of ultimate facts, a statement of the statutes and rules that require reversal or modification of the agency's position, and a statement of the relief sought.

A cross-reference is proposed for inclusion in this amended rule for consistency with the "specifically-named person" provision proposed to be added to Rule 28-106.201, and to insure these persons will be treated by the presiding officer as a party (with independent rights) as opposed to an intervenor (with rights dependent on a party).

A further amendment to the rule is proposed to incorporate the standard for intervention developed in the case law; that is, intervention is in subordination to, and in recognition of, the main proceeding, unless otherwise ordered by the presiding officer.

#### **Rule 28-106.2115: Motions to Disqualify**

The statutory guidance for a party seeking to disqualify an administrative law judge is brief: "Any party may request the disqualification of the administrative law judge by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity." § 120.569(2)(a), Fla. Stat. There are currently no rules implementing this provision.

In this absence, administrative law judges have relied upon the procedure established in Florida Rule of Judicial Administration 2.330, "Disqualification of Trial Judges," for guidance. See Palm Beach Farms Rural Preservation Committee, LLC v. Palm Beach County, DOAH Case No. 18-6308GM, Order Denying Petitioner's Motion to Disqualify at 3 (DOAH Oct. 14, 2019); Dept. of Financial Servs. v. Hunter, DOAH Case No. 12-3622PL, Recommended Order at 4 (DOAH June 26, 2013).

The committee has proposed new Rule 28-106.2115 to provide a uniform procedure by which a party may request the disqualification of an administrative law judge. Much of the new text

mirrors the provisions of Florida Rule of Judicial Administration Rule 2.330, while adjusting the process to comport with the timeframes in Section 120.569(2)(a), Florida Statutes.<sup>6</sup> Because of this parallel, case law interpreting the Rules of Judicial Administration will be instructive in considering disqualification administrative proceedings.

#### **Rule 28-106.213: Evidence**

Current Rule 28-106-213 provides “[i]f requested and if the necessary equipment is reasonably available, testimony may be taken by means of video teleconference or by telephone.” The proposed amendment to this rule would further specify that a party seeking to offer testimony by telephone in their case in chief must file a motion for leave with the presiding officer 5 days prior to the date noticed for the final hearing. The party offering the telephonic testimony would have the duty to ensure a notary is present with the witness and to file a written certification with the presiding officer from the notary “confirming the identity of the witness, and confirming the affirmation or oath by the witness.” Fla. Admin. Code r. 28-106.213(5)(b). These amendments are consistent with current practice at DOAH. See, e.g., PNC, LLC v. Dept. of Revenue, DOAH Case No. 18-4464, Order Granting Request to Take Telephonic Testimony at Final Hearing at 1 (Jan. 28, 2019); Dept. of Health v. Adebiji, DOAH Case No. 18-4813PL, Order Granting Motion to Take Telephone Testimony at 2 (Oct. 26, 2018).

#### **Rule 28-106.214: Recordation; Translator or Interpreter**

The Uniform Rules do not currently contain a process to designate a translator or interpreter for a witness or party, leaving to the discretion of the parties the most appropriate manner to bring the matter to the attention of the presiding officer. See, e.g., Vogel v. Hernandez, DOAH Case No. 06-1039, Prehearing Stipulation at 4 (DOAH Sept. 29, 2006) (“The parties will need a translator for a number of witnesses that may testify during the hearing.”). Given the variety of persons who may be called upon to act as a translator or interpreter, sufficient notice may be desirable to ensure the accuracy of the subject testimony. See Dept. Bus. Prof. Reg. v. Calix, DOAH Case No. 06-2329PL, Recommended Order at 7 n.1 (husband acted as translator for Respondent/wife); Dept. of Bus. and Prof. Reg. v. Honore, DOAH Case No. 07-4601, Recommended Order at 3 (DOAH Jan. 2, 2008) (daughter acted as translator for Respondent/mother); Dept. of Health v. Crisp, DOAH Case No. 17-1832PL, Recommended Order at 3 (DOAH Sept. 28, 2017) (“An official translator provided by the State of Florida was sworn in to translate all testimony for Respondent as English is not her first language.”).

The new proposed rule subsection would require a party seeking to use a translator or interpreter to provide a notice to all other parties 7 days prior to any hearing. This notice must contain the identity of and contact information for the translator/interpreter, the nature of the translation/interpretation services, and a disclosure of the relationship, if any, between the translator/interpreter and the person for whom these services will be performed.

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<sup>6</sup> Compare § 120.569(2)(a), Fla. Stat. (“[a]ny party may request the disqualification of the administrative law judge by filing an affidavit with the division prior to the taking of evidence at a hearing”) and Fla. R. Jud. Admin. 2.330(d) (“[a] motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion”).

### **Rule 28-106.217: Exceptions and Responses**

This rule is proposed to be amended to ensure the method of service for post-hearing submissions is consistent with proposed Rule 28-106.110. No other substantive changes are intended.

## **PART II: PROCEEDINGS AND HEARINGS NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT**

Many of the changes to this Part are identical or nearly identical to their counterparts in Part II, Hearings Involving Disputed Issues of Material Fact. The most significant proposed changes are found in Rules 28-106.302 & 106.3045 (discussed below).

### **Rule 28-106.3015: Amendments of Petitions**

There is no existing rule regarding the amendments of petitions in hearings not involving disputed issues of fact. Subsection 1 of this new rule would establish a rule for such amendments, which rule mirrors the existing one for hearings involving disputed issues of fact (Rule 28-106.202).

Subsection 2 of this new rule would permit a party to amend its petition without leave following an order relinquishing jurisdiction to the agency entered by an Administrative Law Judge. The party could not add new issues of disputed fact that could not have been raised before the Administrative Law Judge.

### **Rule 28-106.3016: Intervention; Appearances by Specifically-Named Persons**

The proposed new rule would add provisions for intervention and appearances by specifically-named persons that mirror those in the rule for hearings involving disputed issues of fact (Rule 28-106.205).

### **Rule 28-106.302: Notice of Proceeding**

This rule is proposed to be reorganized and revised to more closely align with Section 120.57(2). Following receipt of a sufficient petition, the agency would give the parties 14 days to submit evidence in support of or opposition to the agency action or refusal to act, and 7 days thereafter to respond to the other parties' written submissions. The parties could request or the agency could schedule a hearing.

The committee requested comment on a proposed amendment setting a 7-day deadline for the agency to issue a final order following a hearing to implement Section 120.57(2)(a)3. and its directive that the agency provide a written explanation of why it overruled the parties' objections when a hearing is conducted. *Id.*; see *Vicaria v. Dept. of Health*, 715 So.2d 285, 289 (Fla. 3d DCA 1998) (Schwartz, J., dissenting). Based on the comments received, the committee removed this proposed amendment.

### **Rule 28-106.303: Motions**

The proposed amendment conforms this rule and Rule 28-106.204 and requires a motion to include a statement as to whether any party has indicated they intend to file a written response.

### **Rule 28-106.3045: Discovery**

The proposed new rule would add provisions for discovery that mirror those in the rule for hearings involving disputed issues of fact (Rule 28-106.206).

### **Rule 28-106.305: Conduct of Proceedings**

The committee is proposing minor editorial changes for clarity and consistency with the counterpart rule in Part II (Rule 28-106-211).

### **Rule 28-106.306: Recordation; Translator or Interpreter**

The proposed amendments mirror those in the rule for hearings involving disputed issues of fact (Rule 28-106.214).

### **Rule 28-106.307: Post Hearing Submittals**

The committee proposes that this rule be repealed for lack of statutory authority.

## **PART V: EMERGENCY ACTION**

### **Rule 28-106.501: Emergency Action**

The committee proposes that this rule be repealed for lack of statutory authority. Additionally, the rule is substantially similar to Section 120.60(6).

## **CHAPTER 28-110 BID PROTESTS**

### **Rule 28-110.002: Definitions**

The only changes update statutory cross-references.

### **Rule 28-110.003: Notice of Protest**

The only substantive change to the rule proposed by the committee is a clarification that the notice of protest is to be filed with the agency clerk unless otherwise specified in the solicitation.

### **Rule 28-110.005: Bond**

The proposed changes to this Rule would clarify that the bond is due at the same time the written protest is filed and simplify the protest bond form. Because such purchases are uncommon, the reference to “exceptional purchases” in the bond form is proposed to be removed.

**Second Report of the  
Uniform rules of Procedures  
Committee  
(November 1, 2019)**



**SECOND REPORT  
UNIFORM RULES OF  
PROCEDURE COMMITTEE  
NOVEMBER 1, 2019**



## THE UNIFORM RULES OF PROCEDURE

- ▶ The APA directs the Administration Commission (Governor and Cabinet) to adopt one or more sets of uniform rules of procedure.
- ▶ The Uniform Rules of Procedure are codified in Chapters 28-101 through -110 and 28-112.
- ▶ They are posted on the DOAH web site.

## UNIFORM RULES OF PROCEDURE LAST REVISED IN 2013

- ▶ The Uniform Rules were last updated in 2013, based on recommendations from the Administrative Law Section of The Florida Bar. These recommendations were developed by an ad hoc committee and approved by the Section's Executive Council.
- ▶ These changes are summarized in the [April 2013](#) issue of the ALS newsletter.
- ▶ An ad hoc committee has been tasked with reviewing the Uniform Rules and recommending updates.
- ▶ As in 2013, any amendments to the Uniform Rules must be formally proposed and adopted by the Administration Commission before they may become effective.

# ALS AD HOC UNIFORM RULES OF PROCEDURE COMMITTEE

- ▶ ALJ Yolonda Green
- ▶ ALJ Elizabeth McArthur
- ▶ ALJ LI Nelson
- ▶ ALJ David Watkins
- ▶ Seann Frazier
- ▶ Shaw Stiller
- ▶ Paul Drake, Reporter
- ▶ Larry Sellers, Chair

## ALS AD HOC UNIFORM RULES OF PROCEDURE COMMITTEE MEETING DATES

- Next meeting: November \_\_, 2019
- October 23, 2019
- October 14, 2019
- September 16, 2019
- August 5, 2019
- June 10, 2019
- May 20, 2019
- April 22, 2019
- March 11, 2019
- February 4, 2019
- January 14, 2019

## EFFORTS TO SOLICIT INPUT

- ▶ ALS newsletter
- ▶ ALS e-mail blasts
- ▶ ALS CLEs
- ▶ DOAH ALJs
- ▶ ELULS
- ▶ FGBA
- ▶ FGCCA
- ▶ FGLS



# **SUMMARY OF RECOMMENDED CHANGES TO DATE (October 30 Draft)**

## Rule 28-101.001 Statement of Agency Organization and Operation

- ▶ Requires agencies to describe how documents may be filed by e-mail or facsimile as part of their statement of agency organization and operation.
- ▶ Requires the statement to list the holidays and other days on which the agency will be closed and how the public will be informed of unscheduled closures.
- ▶ Requires the statement to be reviewed and updated annually.

## Rule 28-105.0027 Intervention

- ▶ Revises rule governing intervention in declaratory statement proceedings.
- ▶ Provides that an intervenor may, within 7 days of (or such later time as specified in) the order granting intervention, file a response to the petition for declaratory statement.
- ▶ Prohibits reply or other paper directed to a timely response absent leave granted by order of the presiding officer.



## Rule 28-105.003 Agency Disposition

- ▶ Removes unnecessary language stating that, if an agency is headed by a collegial body, it shall take action on a petition for declaratory statement only at a duly notice public meeting.

## Rule 28-106.103 Computation of Time

- ▶ Adds to Saturdays, Sundays and legal holidays, "any other day in which the agency clerk's office is closed."
- ▶ Such days are not included as the last day of a period of time or when the period of time is less than 7 days.

## Rule 28-106.104 Filing

- ▶ Requires pleadings to include the Florida Bar number, if applicable, of the person filing the pleading.
- ▶ Relocates some language to Rule 28-106.110, Service of Papers, and requires each pleading or paper filed with the agency subsequent to the initial pleading to be served in the manner set forth in that rule.

## Rule 28-106.105 Appearances

- ▶ Requires the party seeking representation by a qualified representative who filed the initial pleading to make the filing required by Rule 28-106.106 within 7 days of assignment of a presiding officer.

## Rule 28-106.106 Who May Appear; Criteria for Qualified Representatives

- Provides a definition of qualified representative.
- Clarifies that attorneys licensed in other jurisdictions must file a written request to appear as a qualified representative.
- Requires a party seeking to be represented by a qualified representative to file the written request for that representation within 7 days of assignment of a presiding officer if the representative filed the request for a proceeding on behalf of the party.

## Rule 28-106.106 Who May Appear; Criteria for Qualified Representatives

- ▶ Requires an affidavit from a proposed qualified representative that discloses (a) prior proceedings in which they have been granted or denied permission to appear as a representative and (b) whether they have been denied admission to the bar of any jurisdiction.
- ▶ Requires a lawyer seeking to appear as a qualified representative to disclose all jurisdictions where they are licensed to practice and certify that they are not subject to any disqualifying criteria.
- ▶ Requires the affidavit to state that the representative has read and will comply with Chapter 120 and the Uniform Rules.
- ▶ Prohibits a person who is admitted to practice in any jurisdiction from being a qualified representative if that person has been disbarred, resigned in lieu of discipline, is inactive due to incapacity, or is suspended as a disciplinary sanction from practice.

## Rule 28-106.110 Service of Papers

- ▶ Consolidates existing provisions regarding service.
- ▶ Provides that service after 5:00 p.m. shall be deemed service as of 8:00 a.m. the following day.
- ▶ Consistent with other changes, requires that if the address of record includes an e-mail address, service shall be by e-mail.

## Rule 28-106.111 Point of Entry into Proceedings and Mediation

- Requires the notice of administrative rights to include, if applicable, instructions on how to file documents by e-mail or by facsimile, or, if applicable, instructions on how to electronically file documents.
- Requires the notice of administrative rights to advise that a person may request an extension of time to file a request for hearing and that the request must state good cause for the requested extension.



## Rule 28-106.201 Initiation of Proceedings

- ▶ Adds new subsection (4) to provide that specifically-named persons who are the subject of the agency's proposed action may become a party to the proceeding by entering an appearance as a respondent and describing how their substantial interests are being determined.
- ▶ Similar to former Rule 28-106.205(3) and referenced in amended Rule 28-106.205(4).
- ▶ Examples of such specifically-named persons include the applicant or bidder named in the agency's notice of decision or intended decision that is the subject of a petition for hearing.
- ▶ Provides that such party is a respondent and may raise issues in support of the agency's determination or defenses to the allegations in the petition.

## Rule 28-106.204 Motions (Duty to Confer)

- ▶ Revises the provision governing duty to confer to also require the movant to indicate whether any party intends to file a response to the motion.

## Rule 28-106.205 Intervention

- ▶ Requires an intervenor who seeks to raise new issues to also include the information required by Rule 28-106.201(2)(c)-(g) (prescribing contents of petition).
- ▶ This information includes: a statement of all disputed issues of material fact, a concise statement of ultimate facts, a statement of the specific rules or statutes that require reversal or modification of the agency's position, and a statement of relief sought.

## Rule 28-106.205 Intervention—cont'd.

- ▶ Consistent with case law, provides that intervention is in subordination to, and in recognition of, the main proceeding, unless otherwise ordered by the presiding officer.
- ▶ Revises Subsection (3) (now (4)) to reference the process by which a specifically-named person may become a party— as opposed to an intervenor. See Rule 28-106.201(4).

## Rule 28-106.2115 Motions to Disqualify

- ▶ New rule prescribes the process to be used and the standards for evaluating a motion to disqualify a presiding officer. Much of the text mirrors the provisions of the Rules of Judicial Administration (RJA) governing such motions, while adjusting the process to comport with the time frames in Section 120.569(2)(a), F.S.

## Rule 28-106.213 Evidence

- ▶ Requires a party seeking to offer testimony by telephone to advise the presiding officer at least 5 days prior to the date noticed for the final hearing.

## Rule 28-106.214 Recordation

- Establishes a procedure for the use of interpreters and translators.

## Rule 28-106.217 Exceptions and Responses

- ▶ Revises rule to require that service of exceptions and responses be made in accordance with Rule 28-106.110.
- ▶ Still has the effect of requiring service by e-mail if the address of record includes an e-mail address.



## Part III Proceedings and Hearings Not Involving Disputed Issues of Material Fact

- ▶ Generally makes changes, where appropriate, to conform to similar rules in Part II, Hearings Involving Disputed Issues of Material Fact.

## Rule 28-106.3015 Amendment of Petitions

- ▶ Adds new rule establishing procedures for amendment of petitions in informal proceedings.
- ▶ Similar to Rule 28-106.202, governing amendments to petitions in proceedings involving disputed issues of fact.

## Rule 28-106.3016 Intervention

- ▶ Adds new rule governing intervention in proceedings not involving disputed issues of fact.
- ▶ Similar to Rule 28-106.205, governing intervention in proceedings involving disputed issues of fact.

## Rule 28-106.302 Notice of Proceeding

- ▶ More closely aligns the Rule to requirements of Section 120.57(2), Florida Statutes.

## Rule 28-106.303 Motions (Duty to Confer)

- ▶ Conforms to Rule 28-106.204 and requires that the motion state whether any party intends to file a response to the motion.

## Rule 28-106.3045 Discovery

- ▶ New rule governing discovery in informal proceedings.
- ▶ Similar to the rule governing discovery in formal proceedings.

## Rule 28-106.305 Conduct of Proceedings

- ▶ Makes minor editorial changes.
- ▶ Removes references to bifurcating the proceeding.

## Rule 28-106.306 Recordation

- ▶ Requires the agency to give notice of the method of recordation not later than 7 days before the scheduled commencement of the final hearing. Generally consistent with the existing requirement for formal proceedings in Rule 28-106.214(2).



## Rule 28-106.307 Post-Hearing Submittals

- ▶ Repeals this provision, as it does not appear to be authorized.
- ▶ The only authority for proposed findings of fact and orders is found in Section 120.57(1)(b), relating to formal proceedings.

## Rule 28-106.501 Emergency Action

- ▶ Repealed because it paraphrases the statute.
- ▶ The statute requires that administrative proceedings be “promptly instituted and acted upon” after the emergency suspension, limitation or restriction of a license. The current rule requires that administrative proceedings be instituted “within 20 days.”

## Rule 28-110.002 Definitions

- ▶ Updates cross-references to the statutes.

## Rule 28-110.003 Notice of Protest

- ▶ Clarifies that the notice of protest is to be filed with the agency clerk, unless otherwise designated by the solicitation.
- ▶ Makes minor editorial changes.

## Rule 28-110.005 Bond

- ▶ Clarifies that a protest bond is due at the time of filing a formal written protest.
- ▶ Makes changes to the protest bond form to simplify the form and remove references to exceptional purchases, which are uncommon.

## SOME OF THE KEY CHANGES

- ▶ Describing whether agency accepts filing by e-mail vs Requiring agency to implement E-filing
- ▶ New Requirements for Qualified Representatives
- ▶ Requiring Notice of Rights to advise of Extension of Time
- ▶ Requiring Motion to state whether other party will file a response
- ▶ New Rule Governing Disqualification
- ▶ Requiring service by 5 p.m.
- ▶ Repealing rule re post hearing submittals in informals

## SUGGESTIONS STILL UNDER CONSIDERATION

- ▶ Rule 28-106.112 Notice of agency final orders; standards; grounds to vacate and reissue agency final orders for lack of notice.

## SUGGESTIONS CONSIDERED BUT NOT RECOMMENDED

- ▶ Motions for reconsideration or rehearing (as at PSC).
- ▶ Changing filing deadline from 5:00 p.m. to midnight to conform to RJAs.
- ▶ E-service by DOAH (authorizing legislation not enacted).
- ▶ Extending from 7 days to 10 days the time for filing a response to motions.
- ▶ Authorizing replies to responses to motions



## SUGGESTIONS CONSIDERED BUT NOT RECOMMENDED

- ▶ Defining “good cause” for continuances.
- ▶ Requiring a continuance to be granted if agreed to by all parties.
- ▶ Eliminating the requirement for a “certified” court reporter.
- ▶ Defining “Notice of Intended Decision” to include constructive notice by publication
- ▶ Prescribing time limit for remand to DOAH.

## SUGGESTIONS CONSIDERED BUT NOT RECOMMENDED

- ▶ Specifying consequences of violations of rules
- ▶ Requiring non-lawyers seeking to be QRs to disclose whether they have been convicted of a crime involving dishonesty or moral turpitude.
- ▶ Providing advance notice of proposed emergency orders to affected persons

# SPECIAL THANKS TO THOSE WHO SUBMITTED SUGGESTIONS

- ▶ Fred Aschauer
- ▶ Chris Bryant
- ▶ ALJ Gary Early
- ▶ Laura Gaffney
- ▶ Mike Glazer
- ▶ Keith Hetrick
- ▶ David Miller
- ▶ Eric Miller
- ▶ ALJ John Newton
- ▶ Richard Shoop
- ▶ ALJ Suzanne Van Wyk
- ▶ Karen Walker

- ▶ Melinda Butler
- ▶ Douglas Dolan
- ▶ Brittany Griffin
- ▶ Alyssa Lathrop
- ▶ Wendy Loquasto
- ▶ Gregg Morton
- ▶ Bill Roberts
- ▶ Louise St. Laurent
- ▶ Jacek Stramski
- ▶ Kathleen Toolan
- ▶ Craig Varn
- ▶ Adrienne Vining

## PROCESS GOING FORWARD

- ▶ October 30 Draft distributed for comments.
- ▶ Next (final?) committee meeting is November 2019.
- ▶ Final Report to ALS Executive Council.
- ▶ ALS Recommendation to Administration Commission.

## ANY AMENDMENTS MUST BE FORMALLY ADOPTED

- ▶ REMINDER: As in 2013, any amendments to the Uniform Rules must be formally proposed and adopted by the Administration Commission before they may become effective.