Administrative Law Section Newsletter

Vol. XVI, No. 2 William L. Hyde, John D.C. Newton II, Co-editors January 1995

From the Chair...

by Vivian Garfein

I have served on the Administrative Law Section's Executive Council for the past eight years and I can't recall a busier, more involved time than in the past two months. During our regularly scheduled Fall meeting, which was held in Tallahassee on September 23, Linda Rigot reported on her attendance at the Council of Sections' meeting held on September 10. At that meeting, Linda learned that the Local Government Law Section had asked for approval of a certification program with a broad definition encompassing areas of practice of members of this Section, the Government Lawyer Section, and the Environmental and Land Use Law Section (ELULS).

This section has dealt with the issue of certification many times during the past years. We have consistently voted to reject certification in the area of Administrative Practice. Several reasons have been articulated for this rejection:

1. Administrative law is too broad a practice to lend itself to certification;
2. The administrative forum contemplates lay representation;
3. The practice of administrative law is a process practice; and
4. Areas within administrative law are so diverse that qualification in one area does not correlate to other subject areas.

The Executive Council was so concerned about the reemergence of this issue of certification that they agreed to meet again on October 21 after further investigation on the status of the Local Government Law proposal. What ensued was a flurry of meetings, phone calls, involvement and ACTION on the part of many. We learned that the Local Government Law Section had been working on certification since early 1993, that a proposal had been submitted to the Board of Legal Specialization and Education (BLSE), passed that Board, passed The Florida Bar's Board of Governors and was on its way to the Supreme Court for final approval! All this had happened before three Sections which might be affected (Administrative, Government, and ELULS) were asked to review the language of the proposal.

We obtained copies of the proposal which is titled:

STANDARDS FOR CERTIFICATION OF A BOARD CERTIFIED URBAN, STATE AND LOCAL GOVERNMENT LAWYER

"Urban, State, and Local Government Law" is defined as "the practice of law dealing with legal issues of state, county, municipal or other local governments, such as, but not limited to, special districts, agencies and authorities, including litigation in the federal and state courts and before administrative agencies; the preparation of laws, ordinances and regulations; and the preparation of legal instruments for or in behalf of urban, state and local governments."

Members or our Executive Council hold multiple memberships in various sections of the Bar. This is not unusual since these areas of practice are interrelated. I am a member of ELULS. Mary Smallwood is chair-elect of ELULS. Catherine Lannon, our treasurer, serves as chair of the Government Lawyer Section. The Executive Council perceived a potential impact of this proposed certification on our respective memberships. While we have no objection to a local government lawyer certification, we feel the certification is overbroad with respect to certification of state lawyers and those who practice in the administrative arena. We agreed to attempt to convene a meeting of the officers of the four sections impacted to discuss the status

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of the proposed certification and any actions available to us at this seemingly late date.

On November 4, officers and representatives of the four sections met with Bar staff. We questioned how a certification by one section was all but approved by the Supreme Court without meaningful input from at least three other sections whose members would be impacted by this action. We met again on November 7. There was a sense of urgency to our deliberations. The Board of Governors would meet one last time on November 10 before the petition for certification was scheduled before the Supreme Court.

I'm pleased to report that while our deliberations were intense, they were constructive. It was apparent that we were all looking for a way in which to narrow the scope of the Local Government Lawyer Certification, not overturn it or unnecessarily delay it. Since this is a "case of first impression," we were also grappling with how to accomplish our objectives procedurally.

I contacted Robert V. Romani, our section's liaison to the Board of Governors. Bob immediately wrote to Bar President Blews, alerting him to the problem. Bob was successful in moving the matter for reconsideration at the Board of Governors' meeting. Allen Grossman was present at the meeting to speak on behalf of our section, the Government Lawyer and ELULS sections. The Board voted to send the Local Government Law Certification back to committee where we will have an opportunity for meaningful input. The Board of Governors will take the certification up again at its February meeting. If approved, the petition for certification can proceed to the Supreme Court without delay.

In addition to informing you about this most recent crisis, I want to thank those who took part in the deliberations and worked towards compromise: Julie Yard, Jim Linn, Miriam Maer, and Joni Armstrong Coffey of the Local Government Law Section; Dawna Bicknell, Fay Yenyo, and Jackie Werndli of the Bar staff; Catherine Lannon, Dan Stengle, Sheryl Wood, and Allen Grossman representing the Government Lawyer Section; Mary Smallwood, Bob Wells, and Irene Kennedy Quincey representing the Environmental and Land Use Law Section; and Bill Hyde, Bill Williams and Linda Rigot from our own section. I also want to thank Bob Romani for his support and quick action on our behalf. I look forward to working with all of these individuals and any of you who would like to join us in the weeks ahead as we forge a solution to this problem.

Please call Jackie Werndli at (904) 561-5623 for information concerning the times of our upcoming meetings.

Is the APA the Problem?

by M. Catherine Lannon, Assistant Attorney General

Over the last two years there have been two special legislative committees, a task force, and numerous bills, all directed toward determining how to amend the Administrative Procedures Act (APA) to make government work better.

But after the issues and problems that led to the various studies and bills are analyzed, one really has to ask "Is the APA the problem?"

The APA is about *procedure*: about *process*. Much of the testimony before the committees, however, was about results and about lack of respectful treatment of citizens. When the issues are carefully scrutinized, the complaints all too often are not really about the agencies' granting or denying particular requests. They are not really about the process. They are not really about delegation of authority. They are often about policy choices or the agency's failure to explain its decision to the interested party in a clear and respectful manner.

Many hearings were held at which citizens railed about government actions against them. But many of the stories were really complaints about how government officers and employees treated the citizens. They were about rudeness and failure or refusal to explain why the agency was doing what it was doing.

There is no doubt about it: government officers and employees need to remember—at all times—who their employers are. They are the people of Florida. And every citizen needs to be treated respectfully even when government, acting on behalf of the common weal (as it sees it), must act against the interests of an individual person or business entity.

If government is truly trying to permit its citizens to participate in the decision-making process, then it will not hold its meetings at virtually inaccessible places or at unreasonable times. If it really invites public input, it will allow sufficient notice and time and opportunity to respond. It will not hold its important hearings or meetings during holiday periods.

There are problems, surely. But would changing the APA really solve the problems?

Or does it take better leadership and better training on the part of the agency heads? Or provision of appropriate or sufficient funding to do the jobs the agency heads are charged with doing?

If the real issue is about policy choices, then the real question is: was the *process* the agency used to make its policy choice the problem? If so, then maybe the APA needs to be changed.

Sometimes, however, the laws that are passed are so general that the agencies have to "fill in a lot of blanks" to implement them. Why is this? A number of reasons. One reason may be that the legislators recognize the subject matter expertise of the executive branch and, for that reason, put only the broad policy out-

lines in the law. Another may be that the legislators recognize that there is a problem in a particular area and they are under pressure to do something about it. So they pass a bill with only general directory guidelines and hope it works.

Is it really the agency's fault when it "fills in the blanks" in a way that is not agreeable to everyone? And would changing the APA really solve the problem?

Another reason may be a bit more cynical, but may have some basis in reality. Sometimes a legislator knows exactly what he or she wants a law to do, but it is impossible to pass all the details of the bill—the votes are not there because other legislators refuse to support one or more of the specific provisions. The result is a bill in which important details are amended out. The agency is then left with the very difficult task of implementing a law that does not quite provide the guidance that was initially intended.

Is it really the agency's fault when it does so in a manner that is not agreeable to everyone? And would changing the APA really solve the problem?

On the other hand, many laws are very clear and detailed and, as the agency is implementing them, the toes of some constituent get stepped on. It may be that those toes were the very ones upon which some weight was supposed to be applied, or it may be that the toes were stepped on because of an oversight in the preparation of the law. But the constituent blames the agency. Often, the legislator lets the constituent do so without acknowledging the legislature's role in the problem.

Would changing the APA really solve the problem?

Sometimes the very lawmaker who today is criticizing an agency for not following "the letter of the law" is tomorrow writing a memorandum of explanation to the agency as to why, although the law says one thing, he or she meant another and the agency should interpret the law in light of the "legislative intent." What is an agency to do? Whatever the agency does, it is likely to be criticized.

Would changing the APA really resolve the problem?

Much of the requested and proposed legislative action over the last two years was actually directed to a particular agency or regulatory scheme. Changes were proposed to the APA that keep all agencies from doing or not doing some specific act that one particular agency had either done or not done in resolving a specific issue. The broad brush approach threatened to negatively impact agencies or regulatory schemes that were, in fact, working well. In those instances, perhaps the solution is not to amend the APA, but to amend the particular substantive law under which the agency causing the perceived problem is acting.

Many of the criticisms of government were not from individual citizens, but from special interest groups. Thus, in some instances, reforms asserted to be aimed at assisting individual citizens were really calculated to weaken government's role as the sentinel at the gates in relation to major issues of importance to big special interests.

Some of the changes proposed were characterized as attempts to streamline government, to make it more efficient. But that is not what they always were. Not all of them. Some were sheep in wolves clothing: attempts to bring government to a halt.

One of the overriding feelings arising from the APA reform rhetoric is that when one branch refers to what is wrong with "government," it means the other branch of government, not itself. And that is a big part of the problem. And changing the APA won't really solve the problem.

The solution begins with the legislative and executive branches of government treating each other, not just its citizens, respectfully and acknowledging each other's rightful role in the process. The legislature can write laws more clearly and thoughtfully and the executive branch can carry them out with more diligence, more attention to the views of the citizenry, including special interest groups, and more recognition of the overall statutory scheme.

The modern APA has been in existence for twenty years and it has been amended every single year. In fact, in some instances a single section has been amended multiple times in one legislative session. Maybe tinkering with the APA is not the answer. We need to develop better attitudes toward the respective roles of the executive and legislative branches in the process and allow this fundamentally sound law to work.

1995 Pat Dore Administrative Law Conference Update

The 1995 Pat Dore Administrative Law Conference sponsored by the Section is set for Friday, February 3, 1995, at the Center for Professional Development in Tallahassee.

The one day conference will celebrate the 20th birthday of the revised State Administrative Procedure Act by presenting a spirited colloquy and debate focusing on recent legislative proposals to amend the APA.

Topics include legislative oversight of administrative action, rulemaking, hearings, assessment of regulatory costs and economic impact statements, and a special oral argument presentation before judges of the First District Court of Appeal.

Presenters include representatives of government agencies, private practitioners, and interest groups. Division of Administrative Hearings officers will moderate several of the panels, and, as noted, the judges will participate in the oral argument segment.

The conference will offer two question and answer sessions, lunch and a reception.

Conference chair Bob Rhodes confirms that administrative law pundits, practitioners, and policy makers will not want to miss this one.

For further information see the brochure in this issue or call Jackie Werndli (904/561-5623) at The Florida Bar.

What Every Lawyer Should Know About the Information Superhighway

by Floyd R. Self
Messer, Vickers, Caparello, Madsen, Goldman & Metz, P.A.

Whether you are genuinely interested in the information superhighway or whether it sounds too much like the information super-hype-way, every lawyer should understand how information technology developments are going to impact the law and how it is practiced.

In its simplest terms, the information superhighway refers to the idea that everyone will have access to everyone and all information at any time. The computers, telephones, televisions, fiber optic cable, and other wires and electronics that will hook all of this together have taken on a collective identity as the national information infrastructure.

Convergence is the technological force behind the superhighway concept. Historically, television, movies, newspapers, radio, magazines, books, and data have been created in different media and distributed through independent channels. Now, each of these communications can be reduced to a single form of "information," the binary code of a computer's ones and zeros. In this form, all information can travel the electronic superhighway.

How Lawyers Will Be Affected

The information superhighway will affect the law in three areas. First, it is a land of many opportunities for those who want to provide the service. Mega-mergers and acquisitions, some successful and some not, have received extensive press coverage the last several years. But consolidation and expansion are not limited to Wall Street.

Many of the new services and resources that will constitute or be available on the information superhighway will be the product of entrepreneurial undertakings large and small. These enterprises will require legal assistance in corporate matters any attorney would recognize, including incorporation, contracts, employment, taxation, and lic- ensure. In addition, the information superhighway raises many new issues involving trademarks and copyrights, business secrets, privacy, franchises, criminal theft and sabotage, and governmental regulation. Over time, the information superhighway will require the introduction of new legal concepts and solutions and may require the transformation of many traditional legal principles.

Second, the information superhighway will affect how you practice law. Word processors and computerized legal research services have been valuable tools for improving the quality of legal work and the speed with which lawyers can serve their clients. The advent of compact disc ("CD") systems in law offices merges traditional libraries with electronic ease of access that is the next, intermediate step in this evolutionary process. A CD system makes researching and writing briefs and motions from your desk easier. For example, quotes or excerpts can be located and inserted directly into the document.

With more lawyers installing office networks with access to both in-house CD systems and public information networks, the practice of law will change in other ways. On a simple level, some courts and agencies are already experimenting with electronic filings. Other lawyers at trial already have access to entire case files and research materials on tabletop computers in the courtroom.

In the near future lawyers will be able to work on a brief from home or while traveling on a plane, electronically revising drafts and sharing comments with a colleague next door or a client across the country. Also two-way, real-time video conferences, depositions, and hearings are expected to become standard operating practices.

Immediate access to virtually all recorded information will change the way research is conducted. Today, researching a point of law or the best plane fare and schedule may require a search of multiple databases, a repetitive and time consuming process. However, in the future, electronic "agents" will be able to conduct such searches and report back or take specified action when the search is complete.

For example, today research for an issue involving an administrative licensure hearing might require separate searches of administrative law reporters, state appellate reporters, federal reporters, and agency statutes and rules. In the future, the lawyer could issue the electronic instruction to search all of those databases and report all cases or rules on the identified subject with the caveat that if there are more than ten decisions to report only the cases in which a doctor is seeking license reinstatement. Similarly, in planning travel, you could instruct the electronic agent to book you on the cheapest fare between Miami and New York that leaves next Tuesday morning after 8:00 a.m. and before 12:00 noon where you can have an aisle seat in the first ten rows of the plane. There also could be an additional instruction to update your electronic calendar with all of the relevant information, including an electronic reminder to your family at home.

The third way the information superhighway will affect the practice of law will be by changing who provides services and the infrastructure. Legal and legislative battles over these issues are now underway in Washington and in many state capitals, including Florida. For example, the local exchange companies ("LECs") want to be able to provide long distance services, television,

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Make Plans Now to Attend the Conference on the Florida Constitution

by Stephen T. Maher

The 1968 Florida Constitution, the constitution that governs Florida today, is unlike many constitutions because it not only permits change, it encourages change by requiring periodic review of its provisions by two separate commissions. A constitution revision commission is created every twenty years[1] to examine the constitution, except in the area of tax and budget. It is authorized to place proposed constitutional revisions directly on the ballot. A taxation and budget reform commission plays a similar role in the area of tax and budget.[2]

The constitution revision commission's charge is to "examine the constitution of the state, except for matters relating to taxation or the state budgetary process that are to be reviewed by the taxation and budget reform commission: and to "hold public hearings, and, not later than one hundred and eighty days prior to the next general election, file with the secretary of state its proposal, if any, of a revision of this constitution or any part of it."[3]

The constitution revision commission has been created and performed its constitutional function only once, in 1978. The creation of a constitution revision commission in the spring of 1997 will give Florida the last "scheduled maintenance" on the bulk of its constitution until the year 2018, the fiftieth anniversary of the 1968 Constitution. This may be our last chance to think comprehensively about constitutional change in Florida for a long time. Now is the time to begin preparing for this important opportunity. The commission itself will have only about a year to complete its work, and commissioners who have legislative responsibilities will be diverted for months during that year with legislative work. The sooner people start thinking about this opportunity, the better the process will work.

To help increase public awareness of this process and the opportunity that it represents, the **Administrative Law Section**, the **Council of Sections** and the **Collins Center for Public Policy at Florida State University** have agreed to cosponsor the Conference on the Florida Constitution, a program designed to begin to prepare Florida for the constitutional revision process that will formally get underway in a little more than two years. The **Florida Bar Foundation** has agreed to assist with a grant. The conference will provide the background information necessary for people to begin to give serious thought to the process and to their role in making it a success.

A wide variety of speakers are expected. The discussion will reflect a national as well as a Florida perspective on state constitutions and state constitutional change. Discussion will range from the role and importance of state constitutions today to the history and mechanics of the constitution revision process in Florida. It will include both stories from the past and suggestions for improving the process in the future. The conference is designed to be the first in a series of events designed to enhance public understanding of constitution revision and of the substantive issues likely to surface during the constitution revision process.[4]

This one day conference is scheduled to take place on March 6, 1995 in the Cabinet Room in The Capitol in Tallahassee, Florida. Seats are limited and preregistration is required. Preregistration forms are available from Jackie Werndli at The Florida Bar by phone, 1-800-342-8060, x5623, or by mail, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

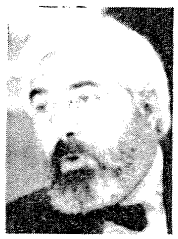
Endnotes:

[1] Article XI, Section 2, of the Florida Constitution provides for a constitution revision commission in 1978, ten years after the adoption of the 1968 Constitution, and then every twenty years thereafter.

[2] A taxation and budget reform commission, covering the areas excluded from constitution revision commission review, is created every ten years, and plays a similar role in the tax and budget area. The constitution revision commission last convened in 1977-78 and is scheduled to be created again in 1997-98. The taxation and budget reform commission last convened in 1990 and is scheduled to be created again in the year 2000.

[3] Art. XI, s. 2, Fla. Const.

[4] For a preview of some of the issues that may be considered by the 1998 constitution revision commission, *see Twenty-Five Years and Counting: A Symposium on The Florida Constitution of 1968*, 18 NOVA L. REV. 715-1701 (1994). For some specific suggestions, *see* Thomas C. Marks, Jr. and Alfred A. Colby, *Some Proposed Changes to the Florida Constitution*, 18 NOVA. L. REV. 1519 (1994).



Stephen T. Maher is the Immediate Past Chair of the Administrative Law Section of The Florida Bar, the Secretary of the Council of Sections and the Chair of the Conference on the Florida Constitution. He presently practices law in Miami with Stephen T. Maher, P.A. and serves as the Director of Attorney Training with Shutts & Bowen. He also trains lawyers throughout the United States through his consulting firm, The Practical Professor Incorporated.

Utilization of Legal Assistants in Administrative Law—Views from Different Perspectives

General Overview

by Joy B. Herring, CLA, CFLA, Paralegal
Boehm, Brown, Rigdon, Seacrest & Fischer, P.A.

The purpose of this article is to provide you with information about various utilizations of legal assistants in administrative law, and hopefully pique your curiosity about legal assistants and their duties if you don't currently have a legal assistant in your office. If you currently employ a legal assistant in your practice, it will give you some additional food for thought on areas in which your legal assistant could be delegated additional responsibilities.

The legal assistant profession came about in the mid 1960s as a result of changes in the law that widened the scope of several areas of practice. One example is the change in personal injury litigation. With comparative negligence, the parties conduct extensive discovery toward a potential jury trial to determine the assessment of negligence. As new law fields developed, the lawyers' work loads increased and the need for additional attorneys occurred. In an effort to provide economically feasible services to their clients, undertake the increased workload, and alleviate working around the clock, lawyers began to delegate some work to trustworthy non-lawyers. As this practice grew, schools to teach substantive law, interviewing techniques, judgment and analytical skills and legal research to budding legal assistants began to proliferate.

In 1986, the American Bar Association first recognized the widespread use of legal assistants/paralegals and devised the following definition outlining the parameters of a legal assistant's duties:

. . . . a person, qualified through education, training or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney, or specifically delegated substantive legal work, which work for the most part requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.

Today, legal assisting is listed consistently in the top 10 new jobs of the 1990s. The prognosis is very good for the continued use of qualified non-lawyer personnel working under the supervision of an attorney.

The economics of utilizing legal assistants falls into three categories: contingency, hourly and set fee billing. Delegating those duties *which do not require independent judgment* to legal assistants frees up attorney time to concentrate on legal issues. Examples of non-delegable tasks include court appearances (exceptions—see article on qualified representative below), giving advice to the client, and discussion of attorney's fees. To attorneys operating under a contingency fee contract, this means that the job can be done with less attorney time. Therefore, lower costs and overhead are assessed. In those cases accepted on a hourly basis, a savings to the client is realized by utilizing legal assistants at a lower hourly billing rate than if the same tasks were performed by an attorney. The attorney can take an increased case load and clients receive a good product at a cost savings. In set fee billing, more hours can be utilized using a legal assistant than an attorney. This helps to alleviate attorney billing "down time," which is a non-productive draw on law office overhead.

The National Association of Legal Assistants and Florida Legal Assistants, Inc. have instituted examinations that they believe set standards to insure that legal assistants designated with a CLA (Certified Legal Assistant) or a CFLA (Certified Florida Legal Assistant) are individuals whose qualifications are synonymous with quality and experience. To maintain a CLA and CFLA designation, 50 hours and 30 hours, respectively, of CLE credit is required during a five year period. Presently, there are 6,710 CLAs nationally and 57 CFLAs in Florida.

The Perspective of a Government Paralegal

by Julie Snow, PLS, CLA
Administrative Assistant—Workers' Compensation Paralegal
Office of General Counsel
Department of Labor and Employment Security

In the years that I have been employed in the government sector, I have worked as a paralegal specialist with the Office of Licensure of the Department of Health and Rehabilitative Services and as an agency clerk and executive secretary to the General Counsel of the Department of Agriculture and Consumer Services. Of my 20 years in the legal field, 13 have been spent in private practice. I received a Professional Legal Secretary (PLS) designation in 1983 and a Certified Legal Assistant (CLA) designation in 1991.

One of my current duties is to review over 200 insolvency petitions each year. Insolvency petitions involve a request to be relieved of the cost of preparation of the record on appeal. Many of these insolvency petitions contain recurring procedural deficiencies which appear to be the result of attorneys' unfamiliarity with certain amendments to the *1993 Workers' Compensation Act*. I review each petition to determine whether it is legally sufficient and complies with Chapter 440, *Florida Statutes*, as amended; Rule Chapter

38F-68, *Florida Administrative Code*; and Rule 4.180, *Fla.R.Work. Comp.P.* I note all deficiencies on a worksheet, which is used by the Department's attorney to object to the granting of the petitions. If the petition for insolvency is granted, I monitor the file through the District Court appellate process to insure reimbursement of any record costs expended on behalf of a Claimant.

In addition, I am currently assigned the task of updating a Workers' Compensation case file database of cases which have been assessed penalties. There are approximately 400 pending files. I handle the collection procedure, which starts with drafting demand letters and goes through the drafting of small claims court complaints.

Due to the recent passage of the *Workers' Compensation Reform Act*, the Division of Workers' Compensation has been involved with extensive rulemaking and rules. I coordinate and track the De-partment's rule challenges on a database. As part of my duties, each week I check the *Florida Administrative Weekly* for any rulemaking activities of the agency. Also, before any document is filed with the Department of State, Bureau of Administrative Code, I check it to ensure that it is in compliance with all technical requirements. In addition, I ensure that all notices are published timely in the *Florida Administrative Weekly* and submitted to the Joint Administrative Procedures Committee.

When involved in rulemaking or other administrative litigation, it is my responsibility to prepare trial notebooks; assist with discovery; prepare and organize exhibits; attend the hearing to coordinate trial exhibits and testimony of our witnesses; take notes on adverse witnesses' testimony, and lend general assistance to the attorney.

I also serve as the Legislative Liaison for the Department's legal office. During the legislative session, I monitor proposed bills or matters of interest to the Department; attend committee meetings on proposed bills; and prepare memoranda on these bills to keep the attorneys informed. I have created a legislative database to track lists of bills which are then monitored, and the updated information is then relayed to the appropriate personnel. I am responsible for coordinating approximately 300 bill analyses for timely response and return to the Legislature.

I draft pleadings as well and prepare files and orders for transmittal to DOAH. The only substantial research that I conduct is legislative history research.

My legal background began with small law firms, including one in the Virgin Islands. After ten years, I began working for a medium-sized firm. I have also worked for one of the nation's largest law firms in New York City for a period of time. With this diversified background, I feel that it doesn't matter where you are "housed" performing legal assistant duties, you still face the daily challenge of using your best judgment, conserving time and effort, and ensuring that proper procedures are documented and followed. I believe that more and more attorneys are realizing the economic worth of a legal assistant and are beginning to utilize them in a more efficient manner. I can only guess as to what extent the legal assistant profession will advance in the next 20 years.

The Perspective of a Qualified Representative

by Chris Hinson, CLA
Legal Assistant
Department of Health and Rehabilitative Services
Office of the Attorney General's Special Projects Section

After leaving the military in 1987, I decided to apply to a paralegal program. I was accepted to attend the National Center for Paralegal Training, an ABA-approved program in Atlanta, Georgia. After several months of intensive, comprehensive, and competitive training, I graduated in May, 1988.

I applied and was hired immediately following graduation as a paralegal specialist for the Department of Professional Regulation (DPR) and was promoted shortly thereafter to a career service paralegal specialist. During my tenure at DPR, I worked for many professional boards, including Construction Industry Licensing, Dentistry, Auctioneers, Osteopaths, Physician's Assistants and Medical. In my present position, I have been assigned to the case of *Electronic Data Systems v. HRS* for the past two years.

With two years of work experience behind me, I studied and sat for the CLA Certified Legal Assistant (CLA) examination and successfully passed this two-day examination in May, 1990.

One of the most fulfilling experiences in my career to date was being qualified as a non-lawyer representative by DOAH and having the opportunity to conduct depositions and a trial before DOAH. Not having the benefit of law school, I relied heavily on training received during my paralegal education. This task was accomplished with the guidance of several senior attorneys and utilizing my experience preparing cases for trial by attorneys. Regardless of the number of times that you prepare an attorney to go to a hearing, there is a big difference when you are the ONE going!

The first step in qualifying as a non-lawyer representative was presenting my qualifications in a motion to DOAH. I had to meet the requirements of Chapter 60Q-2, *F.A.C.* (formerly Chapter 22I, F.A.C). In addition, I had to demonstrate my knowledge of the *Administrative Procedures Act*, DOAH Rules, Model Rules of Procedure, Appellate Rules of Procedure, Rules of Civil Procedure and the Evidence Code. This necessary basic knowledge at first appeared overwhelming. However, to my credit, much of it was acquired through normal work assignments, case preparation and reading transcripts of hearings. Additional preparation came in the form of assistance from experienced attorneys, relating both good and bad past experiences and testing my knowledge of case law and legal theories.

Discovery became much different than the normal drafting of interrogatories and production requests. I had to prepare for and conduct depositions, not just attend, as I had done in the past. A deposition can be intimidating when you are conduct-

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LEGAL ASSISTANTS

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ing one for a first time. However, I managed to complete the deposition after what felt like an eternity.

After many hours of preparation for the hearing, I embarked on the flight to Miami. There was no turning back now. My mind was full of uncertainty. Questions loomed . . . *Can I get the records in evidence? . . Should I have deposed another patient?* . . . After the two day hearing was over and I returned to the Tallahassee airport, I never dreamed that Tallahassee would look so good.

The hearing transcript arrived, and I set about preparing a proposed recommended order. When DOAH's recommended order arrived, most of my proposed findings of fact had been accepted and the Department prevailed on five of six counts, resulting in the revocation of the respondent's license. The case was a success, not only for myself, but for the Department.

I am grateful to the Department for having the faith in me to accomplish these tasks, and I am grateful to the attorneys who assisted me. I encourage the continued use of non-lawyer legal representatives at hearings before DOAH.

I believe that government attorneys will continue to utilize legal assistants on an increasing level. The caseload assigned to government attorneys is staggering, and delegation to competent non-lawyers is a good solution. It is also a constant "stretching" exercise for legal assistants and paralegals, as well as a savings to governmental employers.

The Perspective of a Government Attorney

by Gregory A. Chaires
Department of Legal Affairs, The Capitol

As an Assistant Attorney General in the Administrative Law Section of the Office of the Attorney General, it has been my experience that paralegals and legal assistants are primarily used by our Section to assist in the development and promulgation of rules. In addition, they are used for legal research of case law, statutes, rules and legislation, as well as for preparation of orders for the various boards and agencies.

The Administrative Law Section provides legal counsel to various state regulatory boards such as the Boards of Medicine, Dentistry, Nursing, Chiropractic, Accountancy, Pharmacy and other agencies such as the Elections Commission, Education Practices Commission, and the Criminal Justice Standards and Training Commission. Representing state agencies and boards involves the *Administrative Procedures Act*, Chapter 120, *Florida Statutes* and thus, the rule-making process.

Our paralegals are largely responsible for the time-sensitive process of rule making. They insure that all statutory deadlines are met, that rules are properly noticed and published, that the public is provided an opportunity to comment regarding the proposed rules, and that each rule is final for adoption. This process involves interaction with the Joint Administrative Procedures Committee, professional associations affected by the proposed rules, other interested parties and the Board counsel. Through all of this, the paralegal tracks the rule through the quasi-legislative adoption process.

Paralegals are invaluable during the legislative session when a number of pieces of proposed legislation affecting the various boards and agencies represented by the Administrative Law Section are introduced in the Florida Legislature. This assistance comes in the form of tracking legislation, providing drafts of various bills, and researching the proposed legislation and its history. Legislative history research of the various regulations is done to determine the affect on any of our boards or agencies. In addition, paralegals are utilized in the research of case law and statutes and rules, both federal and state.

Finally, paralegals assist in the preparation of disciplinary and licensure orders issued by the boards and agencies. The regulatory boards and agencies are primarily responsible for the policing of their profession. This is accomplished ultimately by the issuance of orders. The various boards and agencies issue literally hundreds of orders each year, and the assistance of paralegals and legal assistants is invaluable in the preparation of these orders.

Perspective of a Private Sector Legislative Legal Assistant

by Deborah A. Lawson, CLA
Legal Assistant
Butler & Long, P.A.

Although I have always found the field of law to be a fascinating one and had considered attending law school, my career in the legal profession began purely by accident. I took a summer job in 1972 with a busy, growing law firm in Palm Beach, Florida. I found the work to be both interesting and challenging and made a decision to stick with it and learn all that I could. I have worked in the legal field since that time, except while attending college. I first worked as a legal secretary and then as a legal assistant. I passed the CLA examination and was designated in 1989.

The field of legislative law is very different from any other field of law. People either love it or hate it. It can be very gratifying to play a significant role in creating or amending laws that have an impact on the quality of life in Florida. On the flip side, the legislative process can be a frustrating one. For those of us involved with the Legislature, at least 60 days of our lives each year are not our own.

A successful lobbyist must be a good negotiator and must maintain a strong communication network with legislators, legislative aides and other industry representatives. Most of all, a successful lobbyist must have an in-depth understanding of his clients' needs.

The legal assistant who plays a supportive role in the legislative process will most likely spend a great deal of time tracking and monitoring bills, gathering information, and communicating with clients, legislative aides and legislative commit-

tees. There are also many legislative committee meetings to attend in preparation for the session to further monitor the development of proposed legislation.

Although many lobbyists are attorneys, just as many are not. A legal assistant may play a behind-the-scenes role or with the right amount of experience and background, can evolve into lobbying effectively on his or her own.

When the legislative session begins, you are off to the races. During this period of time, you should be prepared for anything and everything. When it's over, most of us involved with the Legislature sit down, take a deep breath and refocus our energy.

On a more personal note, I am pleased to see how our profession has grown. In 1972, legal assistants and paralegals were virtually unheard-of outside of a few large cities like New York or Chicago. We have become an important part of rendering quality and affordable legal services. I pursued the CLA designation because I believed it was important evidence of my professional standing and abilities. I consider it vitally important that our profession maintain high professional ethics and standards. With the growth of legal assisting, I believe that statewide regulation will be forthcoming.

The Perspective of a Private Sector Legal Assistant

by Sara Fulghum
Legal Assistant
Parker, Hudson, Rainer & Dobbs

I have held the position of legal assistant for the past two years, having been promoted from a legal secretarial position that I held with the firm for the previous five years.

I believe that a legal assistant is a layer within the legal framework that is unique to the legal community in that it is a resource to both attorneys and clients. The benefits of a legal assistant to an attorney include providing assistance to handle the attorney's caseload, as well as ensuring an efficient system of organization, scheduling, and computer aids in an effort to accomplish these tasks. In addition, the performance of these responsibilities generates revenue for the firm. The benefits of a legal assistant to the client include efficiency and a quality work product at a reduction in cost.

Each law firm utilizes a legal assistant in various ways. My job responsibilities have increased over my tenure with the firm. Our primary area of practice involves obtaining certificates of need (CON) for health care facilities. My role ranges from obtaining documents at various agencies to conducting legal research on specific issues. I am responsible for the filing deadlines from the commencement of the CON application through the litigation process. Under the direction of my supervising attorney, I draft pleadings, discovery documents, and author, as well as sign, correspondence to clients, consultants and others.

Once the discovery process is underway, I am responsible for tracking incoming and outgoing documents. All documents, once they are tendered or gathered, are processed through me and then distributed to the appropriate individuals. In addition, I organize, maintain and prepare documents in preparation for the formal hearing before DOAH. My position also requires that I compile and prepare witness and document lists, as well as document retrieval lists to expedite locating any document at any given time.

I am responsible for summarizing deposition transcripts. This task is a good example of how a legal assistant benefits both the attorney and client. A concise summary is available to the attorney for use in preparing for the final hearing without extensive file review or reading. The client benefits because the task was accomplished at the legal assistant's billing rate, rather than the attorney's.

There are many more ways to utilize the skills of a legal assistant. Time nor space will not permit a complete list. However, the bottom line is that legal assisting reduces the attorney's workload and his or her stress, generates revenue for the firm and provides a decreased billing cost to the client.

The Perspective of a Private Sector Attorney

by Gary J. Anton
Stowell, Anton & Kraemer

I have been litigating civil and administrative law cases for the past thirteen years, specializing in both employment and certificate of need litigation. For the first nine years, we did not utilize in-house paralegals, but relied solely upon support staff and law clerks for litigation support. In some instances, we contracted with outside paralegals for more complex cases.

However, in 1990, we saw the need for a full-time employee who could be devoted primarily to case management and litigation support. Good case management is crucial to the success of any litigation team. Staff members are often consumed by word processing tasks, and law clerks are busy with legal research assignments. Attorneys are often too busy juggling caseloads, making it impractical to maintain the high level of organization necessary to keep a litigation team running smoothly. Paralegals can devote their efforts almost exclusively to investigative assignments, document control and litigation support (including litigation software and databases), thus freeing the attorney and other support staff personnel to perform their normal functions.

Paralegals also provide valuable assistance at initial client conferences, discovery proceedings, depositions and trial. Often, it is difficult for attorneys to maintain their strategic edge and train of thought when they are forced to deal with distractions in the form of note taking, exhibit control and jury observation. A good paralegal not only ensures organization but also provides valuable assistance by acting as the attorney's second set of eyes and ears.

In addition to the paralegal's organizational and management skills, probably one of their most beneficial assets is their ability to handle tasks that have traditionally been reserved for associates. This includes participation at all levels of discovery; exhibit and witness management; and pretrial and trial preparation which includes preparation of

continued...

LEGAL ASSISTANTS

from preceding page

witnesses, compilation of trial notebooks, organization and authenticity of trial exhibits, and issuance and service of trial subpoenas. As paralegals take on more case management responsibilities, it not only allows the litigation team to operate more efficiently in meeting deadlines and maintaining organization, but it also saves clients' money. If paralegals are utilized properly at the onset of a case and kept active throughout the case, the client gains a second valuable litigation team member for less than half the cost of another attorney.

Today, because of the emphasis in the legal field on increased productivity and efficiency while decreasing client costs, paralegals are fast becoming an integral part of the legal community. In order for the ever increasing number of attorneys to compete in the struggle for business, they must work more productively and efficiently in order to maintain success. Paralegals are a valuable resource which must be tapped and utilized effectively if attorneys wish to keep their competitive edge.

The Perspective of a DOAH Hearing Officer

by Mary W. Clark

Rule 60Q-2.008, *F.A.C.* (as well as its still-extant counterpart, Model Rule 28-5.1055 *F.A.C.*) offers a unique opportunity to paralegals—an opportunity with substantial benefits for the litigants and for the hearing officer.

In pertinent part, Rule 60Q-2.008 provides:

> 60Q-2.008 Who May Appear: Criteria for Other Qualified Representatives
>
> (1) The intent of the administrative process is to secure the just, speedy, and inexpensive determination of proceedings in which the substantial interests of a person are affected. Any person compelled to appear, or who appears voluntarily, before any Hearing Officer in any proceeding has the right, at his own expense, to be accompanied, represented, and advised by counsel or by other qualified representatives. (Counsel shall mean a member of The Florida Bar or a law student pursuant to Article XVIII of the Integration Rule of the Florida Bar.) This rule shall be liberally construed to promote and facilitate access to the decision making process of government.

The rule also outlines a simple process for approval by the hearing officer before whom the qualified representative (QR) seeks to appear. This approval process is designed to assure that the prospective QR is familiar with applicable statutes and rules and specifically, that he or she is familiar with Chapter 120, *Florida Statutes*, and the rules of civil procedure and evidence that are related to administrative proceedings. In this regard, the paralegal QR may be better prepared than some attorneys who may never have practiced administrative law and who may be confused or frustrated with a hearing officer's rulings on hearsay objections and with other aspects of the formal Section 120.57(1) proceeding that are not directly translated from criminal or civil practice to administrative law practice.

Once approved as a QR, the paralegal is entitled to handle the client's case in every respect as would an attorney, and the QR is subject to standards of conduct that are similar to those which govern members of The Florida Bar and certified law students. See, Rule 60Q-2.009, *F.A.C.* A competent paralegal can thus participate fully in every aspect of the presentation of an administrative case, and the parties and hearing officer have the advantage of a truly qualified QR.

This hearing officer has been impressed and pleased with the professionalism of the paralegals who have practiced before her to date. They have been effective advocates. In many cases, they have trained in specific substantive areas of law (for example, employment, environmental or license discipline cases) and practice only in that field. In most cases, they have provided carefully researched and well-written pleadings, memoranda and proposed orders.

In those cases in which a paralegal has participated, not as a QR, but as an assistant to an attorney fortunate enough to have that resource, and skilled enough to properly utilize the paralegal, the hearing runs more smoothly. The paralegal organizes the exhibits and makes sure they are available when needed. The paralegal also helps prepare witnesses and makes sure they also are available when needed. Less time is wasted, hearing momentum is maintained, and the hearing officer and parties are less-stressed and happier.

Administrative law is a rich and rewarding field. Persons interested in paralegal professional practice are urged to obtain training and experience in this area. Attorneys who have already discovered the joys of administrative law practice should encourage paralegals and provide opportunities for their participation before DOAH.

If you would like more information on the two certification programs in Florida available to legal assistants, informative handouts developed to assist you in utilizing legal assistants, or to speak with any of the contributors to this article regarding their views, please call Marty Streeper, at 1-800-433-4352 or (813) 985-2044. Ms. Streeper is Co-Executive Director of Florida Legal Assistants, Inc. and is located in Tampa.

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Conference on the Florida Constitution

March 6, 1995

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Big Changes at the First District

by Thomas D. Hall

The First District Court of Appeal recently issued two administrative orders, both approved by the Florida Supreme Court, which herald big changes in the way the court will operate. It appears that presently no other court in the country is using such innovations. Complete copies of both orders are set forth elsewhere in the newsletter.

Starting January 1, 1995, the court will operate in two separate autonomous subject matter divisions. One division will handle only administrative cases, including workers' compensation cases. That division will have 5 judges. The other division will be a general division and will consider the remainder of the court's cases. That division will have 10 judges. Each division will consider cases en banc, but only with the judges in that division. There is a provision in the order for the court to sit en banc as an entire court; however, three-fifths of the active judges must vote to consider a case en banc under those circumstances. Initial assignments to the different divisions are: Administrative Division – Chief Judge E. Earle Zehmer, Judge Edward T. Barfield, Judge Michael E. Allen, Judge Charles J. Kahn, Jr. and Judge Marguerite H. Davis; General Division – Judge Richard W. Ervin, III, Judge Anne C. Booth, Judge James E. Joanos, Judge Charles E. Miner, Jr., Judge James R. Wolf, Judge Peter D. Webster, Judge Stephan P. Mickle, Judge L. Arthur Lawrence, Judge Robert T. Benton, II and Judge William Van Nortwick. The court will sit in divisions for 2 and 1/2 years and then evaluate the process.

The other order establishes use of a video teleconferencing system to conduct oral argument in a great number of the court's cases. The First District is unique in Florida in that a large percentage of its cases arise from outside its territorial jurisdiction. In an effort to alleviate the expense and other inherent problems that arise from having to have attorneys travel to Tallahassee from distant parts of the state, the court has twice in the past experimented with conducting oral argument by video teleconference. Based on the success of those experiments the court is implementing oral argument by video teleconference effective January 1, 1995. Besides the equipment located at the court in Tallahassee, the court will make use of the State's video teleconferencing locations in Miami, Ft. Myers, Orlando, Tampa, Jacksonville and West Palm Beach. A Pensacola location should be added to the system shortly after the first of the year. Initially all the attorneys participating in a particular argument will have to be in the same city. Eventually it will be possible to conduct argument from a number of different cities simultaneously. The court will continue to travel within the district to hear oral argument in accordance with section 35.11, Florida Statutes.

The court is hopeful that both of these changes will help reduce the time and expense currently inherent in the appellate process.

District Court of Appeal, First District
Tallahassee, Florida 32399-1850
Telephone (904) 488-6151
Date: October 3, 1994

ADMINISTRATIVE ORDER)
In Re: Oral Argument by Video)
Teleconference Network) ADM ORDER 94-1
_____)

BY ORDER OF THE COURT:

The following provisions will govern oral arguments before this court using video teleconferencing network:

1. Video teleconferencing equipment for conducting oral arguments is being installed in this court for use with a network connected to remote facilities located in the following cities: Jacksonville, Orlando, West Palm Beach, Miami, Ft. Myers and Tampa. To facilitate the scheduling of arguments on this network, all requests for oral argument from attorneys located in or near these cities will be deemed to request oral argument by use of the video teleconference network unless the request explicitly specifies that the oral argument be held in the courtroom at Tallahassee, Florida. Initially, argument by video teleconference network will be granted only when all attorneys expected to present argument are located near a single remote facility; however, in the future the court expects to schedule attorneys at two or more remote facilities.

2. If oral argument is ordered to be conducted on the video teleconference network, the requesting party will be required to submit to the clerk of the court, within 10 days of the date of the order granting oral argument, a fee in the amount specified in the order to cover the costs of the video teleconference for that argument, as provided in section 35.22(7), Fla. Stat. (1993). The fee will be taxable as costs in favor of the prevailing party in accordance with Florida Rule of Appellate Procedure 9.400. Failure to timely submit the fee will be deemed a waiver of the request for oral argument. After a case has been set for oral argument and the fee has been paid, the fee will be nonrefundable if oral argument is canceled at the request of the parties. The fee will be refundable if oral argument is cancelled by the court.

4. The Court may, on its own motion, require that oral argument be conducted in Tallahassee even though video conference is requested. The court will continue to schedule oral arguments throughout the district as provided in section 35.11, Florida Statutes (1993).

WITNESS the Honorable E. Earle Zehmer, Chief Judge of the District Court of Appeal, First District, and the Seal of said Court, at Tallahassee, Florida, this 3rd day of October 1994.

JON S. WHEELER, CLERK, FIRST DISTRICT COURT OF APPEAL

continued...

District Court of Appeal, First District

Tallahassee, Florida 32399-1850
Telephone (904) 488-6151
Date: October 3, 1994

ADMINISTRATIVE ORDER)
In Re: Court Divisions.)
) ADM ORDER 94-2
)

BY ORDER OF THE COURT:

Pursuant to section 43.30, Florida Statutes (1993), and the affirmative vote of a majority of the judges of the court, the following rule is adopted to create two autonomous divisions of the court. These divisions will remain in effect for a minimum of 2 1/2 years and will be structured and function in the following manner:

1. Two divisions of the court known as the "General Division" and the "Administrative Division" are hereby established within the court, effective January 1, 1995. All cases and matters not assigned to the Administrative Division as herein provided will be assigned to the General Division. Each division will consider and determine assigned cases and matters, and each division will be autonomous in respect to those cases and matters unless the court elects to consider the matter en banc as provided herein.

2. All matters arising out of or proceeding under the following provisions of Florida Statutes (1993) will be assigned to the Administrative Division:

(a) Chapter 120 (the Florida Administrative Procedure Act)
(b) Chapter 440 (the Florida Workers' Compensation Act)
(c) Section 24.110 (All civil or administrative actions against the Lottery Department)
(d) Section 39.074 (Decisions of Governor and Cabinet regarding siting of juvenile facilities)
(e) Section 72.011 (Actions by taxpayers, resident and non-resident, challenging tax assessments)
(f) Section 99.097(5) (Action to contest verification of ballot petition by Department of State if more than one county is involved)
(g) Section 102.1685 (Action to contest nomination or election or results thereof when more than one county is involved)
(h) Section 163.01(7) (Actions to validate bonds under the Florida Interlocal Cooperation Act)
(i) Section 193.1145(2) (Actions against the Department of Revenue to contest the disapproval of any or all parts of an assessment roll)
(j) Section 194.181(5) (Constitutional challenges to tax assessments)
(k) Section 195.092(2) (Suit by property appraiser or taxing authority to contest validity of any rule, regulation, directive, or determination of any agency of the state disapproving any or all of an assessment roll or determination of assessment levels)
(l) Section 255.518(4) (Actions to validate obligations of the Division of Bond Finance and the Division of Facilities Management)
(m) Section 350.158 (All decisions of the Public Service Commission except those specifically designated for review by the Supreme Court)
(n) Section 420.509(4) (Actions to validate revenue bonds regarding land management)
(o) Section 527.16(2) (Action to compel testimony pursuant to subpoena relating to Department of Insurance investigative authority)
(p) Section 602.065(14) (Appeals involving citrus canker claims)
(q) Section 624.310(5) (Actions to enforce administrative fines imposed under the Florida Insurance Code against foreign insurers and persons not residing in the state)
(r) Section 624.321(2) (Action to compel testimony pursuant to subpoena relating to Department of Insurance investigative authority)
(s) Section 626.8463(3) (Action to compel testimony pursuant to subpoena relating to Department of Insurance investigative authority)
(t) Section 628.802(1) (Action by Department of Insurance to enjoin insurer, director, officer, employee, or agent of an insurer for violating insurance law holding company provisions)
(u) Section 629.401(18) (Action to compel testimony pursuant to subpoena relating to insurance examiner's investigation authority)
(v) Section 631.021 (Delinquency proceedings against a domestic, foreign, or alien insurer)
(w) Section 631.371 (Alternative seizure order provision involving Department of Insurance)
(x) Section 766.314(6) (Actions to compel collection of assessments pursuant to Florida Birth Related Neurological Injury Compensation Plan)
(y) Section 944.095(12) (Decisions of Governor and Cabinet relating to siting of correctional facilities of the Department of Corrections)

3. Original proceedings pursuant to Article V, Section 4(b)(3), of the Florida Constitution, and rule 9.100, Florida Rules of Appellate Procedure, that arise out of or involve the above described matters to be assigned to the Administra-

tive Division will likewise be assigned to that division for consideration and disposition. All other original proceedings will be assigned to the General Division.

4. The Administrative Division will be staffed by five active judges of the court assigned by the remaining ten active judges of the court. To establish a two-year term for service in the Administrative Division, with one judge rotating every four months, the initial assignments of judges to the Administrative Division will vary between 16 months and 36 months. Thereafter, each of the judges assigned to the Administrative Division will sit for a term of two years, and one judge will rotate out of that division to the General Division every four months. Assignments to the Divisions will be by administrative order entered by the chief judge. The chief judge may temporarily assign an active judge from one division to the other if necessary for a division to efficiently and timely process assigned matters. Senior or associate judges ordered to serve with the court may be assigned by the chief judge to serve with either division as needed.

5. The chief judge is responsible for assignment of all cases and assignment of judges to panels in both divisions. The chief judge's central staff attorneys will continue to provide support to the chief judge and panels in both divisions regarding motions, original writ proceedings, and designated types of cases. The chief judge will initially consider all motions and original writs for assignment and disposition. Each division will have a writs and motions panel that will consider and determine cases and matters assigned to such panels by the chief judge.

6. The chief judge will be assigned to one division and will appoint an administrative judge for the other division. The administrative judge will serve a term of not less than one year and be responsible for handling administrative matters in that division as delegated by the chief judge.

7. Each division may elect to sit en banc on matters assigned to that division in accordance with rule 9.331, Florida Rules of Appellate Procedure. The entire court may sit en banc on any matter upon a vote of three-fifths of the regular active judges of the court. The chief judge will preside at all en banc proceedings; however, the chief judge will have a vote only in respect to en banc matters determined by the division to which the chief judge is assigned or matters being considered en banc by the entire court.

WITNESS the Honorable E. Earle Zehmer, Chief Judge of the First District Court of Appeal and the Seal of said Court, at Tallahassee, Florida, this 3rd day of October 1994.

JON S. WHEELER, CLERK
FIRST DISTRICT COURT OF APPEAL

Case Notes

by Dave Dagon

Supreme Court Opinions

Well, the Supremes are at it again, and section members now have another imponderable from the high court with the decision in ***Wiregrass Ranch, Inc. v. Saddlebrook Resorts, Inc.*, 19 Fla. L. Wkly S414 (Sept. 1, 1994).**

In *Wiregrass*, the Court held that the Fifth DCA's opinion in *Middlebrooks v. St. Johns River Water Management District*, 529 So.2d 1167 (Fla. 5th DCA 1988), stated the appropriate rule for an agency's jurisdiction to proceed where a challenger withdraws after the final hearing, but before entry of a final order. In short, a challenger who withdraws after the close of evidence does not deprive the agency of jurisdiction. Consistent with the reasoning in *Middlebrooks*, the agency could issue a final order. A conflicting opinion in *McCoy* was disapproved.

EXTENDED COMMENTARY; or "Après *Wiregrass*, Le Deluge."

On its way up, the *Wiregrass* case promised to yield a simple opinion. The facts were easy: a challenger to an agency intent to issue had sought withdrawal after filing exceptions to a recommended order. One merely had to decide whether agency jurisdiction was lost under *John A. McCoy Florida SNF Trust v. Department of Health & Rehabilitative Services*, 589 So.2d 351 (Fla. 1st DCA 1991), or retained under the conflicting opinion in *Middlebrooks v. St. Johns River Water Management District*, 529 So.2d 1167 (Fla. 5th DCA 1988). A thoughtful opinion might even settle once and for all whether the dismissal rule of civil procedure, Fla. R. Civ. Proc. 1.420(a)(1), was at all applicable to administrative proceedings, particularly where the agency failed to adopt such a rule.

A simple problem, no? No! While the Court eventually sided with the 5th DCA's *Middlebrooks* opinion, a funny thing happened on the way to the holding. A casual reading of the opinion yields at least three critical observations. First, the Court appears to have misstated the procedural history of the case. In *Wiregrass*, the challenger sought to withdraw entirely from the proceeding. *Saddlebrook Resorts v. Wiregrass*, 630 So.2d 1123, 1124 (Fla. 2d DCA 1993), *approved*, 19 Fla. L. Wkly S414 (Fla. 1994). But the Court's opinion instead states that *Wiregrass* offered a "motion for a voluntary dismissal of its *exceptions*." *Wiregrass*, 19 Fla. L. Wkly at S145 (emphasis added). (ASIDE: Of course, one might suppose the Court used the loaded term "exceptions" in a more general sense, in which case the opinion would admit of a different, lesser fault.)

Second, in examining the agency's

continued...

CASE NOTES

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authority to proceed with adjudication, the Court found it necessary to consider the agency's interests and—one presumes—its very standing as a party. Look closely at this passage in particular, where the Court's opinion starts to take the scenic route to *Middlebrooks*:

> Given the very express legislative permitting authority given to this type of executive agency, we must realize that this type of adjudicatory body exercises jurisdiction in matters over which it may be as much a party as the applicant or the objector affected party. This type of permitting agency is different from a court because of the fact that it may have as much interest in the outcome in protecting the public's interest as directed by the legislature as the applicant or the objector may have as a party protecting its respective property interest.

19 Fla. L. Wkly at S415. A question comes to mind: Huh? Of course the agency has an "interest" in the proceeding; it issued the challenged intent in the first place! It would have been a simple matter to state that the agency has jurisdiction to proceed to adjudication. But instead, the Court found both "jurisdiction *and the discretionary authority to continue*," 19 Fla. L. Wkly S415 (emphasis added), from its reading of the organic statute.

This is the most significant part of the opinion since it relies—without citation—on the existence of "discretionary" agency authority to continue adjudication. (The cautious reader will recall the last time we heard of such a creature in administrative law was in *Bay National Bank & Trust Co. v. Dickenson*, 229 So.2d 302 (Fla. 1st DCA 1969) (holding that discretionary "quasi-executive" functions were beyond the reach of the 1961 APA).) Questionable, if not sufficient, support could have come from a case like *Rabren v. Department of Professional Regulation*, 568 So.2d 1283, 1289 (Fla. 1st DCA 1990) ("It is well established that the existence of adjudicatory power can be implied in the statute.") (citing no more than 1 Fla. Jur. 2d, *Administrative Law* §60).

But that aside, what mischief will come from this reasoning? Plenty. Consider this: before *Wiregrass*, an agency wishing to retain jurisdiction over "withdrawn" petitions had to adopt Rule 1.420, Fla. R. Civ. Proc., or some similar rule, as the agency did in *Middlebrooks*. But after *Wiregrass*, agencies are presumed to have this "discretionary" authority—regardless of whether or not they adopted such a procedural rule. After *Wiregrass*, agency procedural rules, at least with respect to the effect of withdrawals, become not a function of their plenary procedural rulemaking authority under Section 120.53, but rather emanate from their "interest in the outcome in protecting the public's interest." 19 Fla. L. Wkly at S415. What we have here is not an agency procedural rule, but an agency "procedural policy." (Keep in mind that—unlike *Middlebrooks*, where the agency adopted Rule 1.420, Fla. R. Civ. Proc.—no party had notice that the agency would retain jurisdiction after withdrawal.)

To that extent, the opinion would be consistent with the line of cases warming to the notion that agencies' jurisdiction can rest on something as ephemeral as "colorable statutory authority." *Department of Professional Regulation v. Marrero*, 536 So.2d 1094 (Fla. 1st DCA 1988) (finding that State Board of Medicine acted with "colorable statutory authority" when it refused to permit a physician to withdraw his license application); *Department of Environmental Regulation v. Letchworth*, 573 So.2d 967 (Fla. 1st DCA 1991); *see also Rabren v. Department of Professional Regulation*, 568 So.2d 1283 (Fla. 1st DCA 1990); *see also Humana of Florida, Inc. v. Department of Health and Rehabilitative Services*, 500 So.2d 186 (1st DCA 1986), *rev. denied*, 506 So.2d 1041 (Fla. 1987); *RPC. Inc. v. Department of Health and Rehabilitative Services*, 509 So.2d 1267 (Fla. 1st DCA) (finding, based upon an examination of chapter 381 that once an application for a certificate of need is withdrawn the agency's jurisdiction is absolutely terminated).

More ominously, the Court's opinion takes as a credential what Professor Davis called "[t]he very identifying badge of the American administrative agency"—that is: "power, *without previously existing rules*, to determine the legal rights of individual parties." Davis, *Discretionary Justice* at 41 (emphasis added). The framers of Florida's APA had tried to get away from such a system of implied power, discretionary authority, and procedure based on expediency. *See* Reporter's Comments at pp. 17-18. Although limited, *Wiregrass* revives this reasoning.

This leads to a third observation about the *Wiregrass* opinion: it takes an unnecessary detour through the Rules of Civil Procedure, even though the case arose entirely out of a Chapter 120 proceeding. Indeed the agency had never adopted or incorporated the relevant rule of civil procedure. Whether the dismissal rule governing civil actions has any relevancy for APA proceedings is a far more interesting question than the one answered by the Court's confusing assurance that "even if" the rules were applicable, no dismissal is allowed. 19 Fla. L. Wkly S414. If anything, the Court's gratuitous consideration of Rule 1.420(a)(1) will only fuel the fire.

Evidently, the Legislature's repeated attempts to push agencies towards rulemaking (even for procedural matters) has failed to drive from Florida the serpent of agency "discretionary authority." To that extent, the Court's reasoning in *Wiregrass* may prove to be yet another snake in the grass. Look for more agencies invoking procedures never adopted as a rule based entirely on their "discretionary" authority. Look for more agencies justifying their "procedural policies" based on their tautological "Interest in the outcome in protecting the public's interest." 19 Fla. L. Wkly at S415.

* * *

Given this development in *Wiregrass*, one might be relieved to know that the Court decided to drop the hot potato in ***Gessler v. Department of Business & Professional Regulation*, 627 So.2d 501 (4th DCA 1993), *cause dismissed*, 634 So.2d 624 (Fla. 1994).** The opinion of the Fourth District stands. Agencies must index their orders in order

to rely on them for precedent in an adjudication.

COMMENT: Space does not permit a lengthy discussion of *Gessler*; there are more subtle fish to fry. Those needing more information on the impact of *Gessler* are directed to Charles Curtis' able note entitled "How to Win the Battle But Lose the War," in the Bar's *Government Lawyer Section Reporter*, Vol. III, No. 1, pp. 10-11 (September, 1994).

* * *

Opinions of the District Courts of Appeal

The Second District lost no time in applying the Supreme Court's holding in *Wiregrass*. The ink was barely dry on the order denying rehearing in *Wiregrass* when the Court in ***City of North Port v. Consolidated Minerals, Inc.*, 19 Fla. L. Wkly D2024 (Fla. 2d DCA Sept. 23, 1994),** applied it as precedent. Consolidated Minerals had applied to the District for a water use permit (now something of a rare commodity in southwest Florida). Both Consolidated and its opponents contested the draft permit and its numerous conditions. A recommended order issued and no exceptions were filed by Consolidated. The applicant then sought to withdraw the application. But of course, *Wiregrass* controlled; the applicant could not withdraw the application after the close of evidence without the consent of the agency.

COMMENT: The Court did expand a bit on the logic of *Wiregrass* in two respects. It was concerned that "[t]o permit an applicant to unilaterally withdraw an application for a water use permit after the fact-finding process affords the applicant the advantage of 20/20 hindsight . . . ." 19 Fla. L. Wkly at D2024. In addition to this issue of fairness, the court was concerned that "allow[ing] an applicant to activate the fact-finding process and then withdraw the application endorses a practice which can be used to deplete the financial resources of a challenger." *Id.*

These are important concerns; however, at most they merely amount to good reasons why the South Florida Water Management District should adopt a procedural rule respecting withdrawals, as have other Districts. This much is clear; the South Florida Water Management District no longer has any incentive to clarify these sorts of procedural matters in its rules; it merely needs to get a court to approve of them as a form of inherent authority or "procedural policy."

One has to wonder: would the applicant in *Consolidated Minerals* have gone to a hearing if they knew there would be no right to withdraw? Is it fair that the applicant in *Consolidated Minerals* planned strategy around the published agency procedural rules, only to have the courts augment these rules with *Wiregrass*? Perhaps it is fair enough; but it's unfortunate that these procedural points are decided by the courts with 20/20 hindsight. Agencies sensitive to their duty to fairly describe their procedures to the public will not seek to exploit *Wiregrass*, and instead faithfully follow the Legislature's command that they do in fact adopt "rules of practice setting forth the nature and requirements of all formal and informal procedures." §120.53(1)(a), Fla. Stat. (1993).

* * *

Those still skeptical of the problems inherent in *Wiregrass*' recognition of inherent agency powers should read closely the opinion in *Citrus County v. Citrus County Professional Paramedic / EMT*, 19 Fla. L. Wkly D1820 (Fla. 5th DCA Aug. 19, 1994), issued just a few weeks prior to *Wiregrass*.

An association of paramedics had reached (in their view) an impasse in labor negotiations with the county. The union filed a charge of unfair labor practice and the Public Employee's Relations Commission, according to custom and practice, issued a non-final order staying the impasse action. Since the impasse resolution would inevitably involve an order for additional bargaining, PERC saw no point in proceeding with the collateral charge. The county sought review of the non-final order staying the action, arguing that it befuddled their plans to privatize the EMT services. Hearing the matter on an emergency basis, the Court considered PERC's authority to issue such a stay absent any statute or rule.

The court was at first troubled by the lack of authority for the stay: "The absence of any rule prescribing the timing, substance and criteria for issuance of stays of impasse proceedings, or obtaining relief from such a stay, based on the filing of an unfair labor practice charge seems inconsistent with the manner in which an administrative agency should carry out its work," 19 Fla. L. Wkly at D1820. But the need to preserve agency jurisdiction proved dispositive: "In carrying out its duty to adjudicate and remedy unfair labor practice charges, PERC has the inherent power to order the parties to maintain the status quo if necessary to preserve the subject matter of its jurisdiction." *Id.* (footnote omitted). The petition to review the non-final order was therefore denied.

COMMENT: The importance of EMT services, the urgency of the petition, the lack of severe prejudice to the county, and the non-final nature of the order will convince many that denying the petition was proper. But should the agency take from the opinion the notion that there is no duty to create rules?

The Court noted that under *City of Miami v. FOP Miami Lodge 20*, 511 So. 2d 549 (Fla. 1987), PERC has the power to create statements of general applicability that implement, interpret and prescribe law or general policy in the course of adjudicating a case. According to the panel, "[a]pparently, this meant to the supreme court that PERC may rely for its authority on its previous orders and need not promulgate a rule." 19 Fla. L. Wkly at D1820. Taken to an extreme, this portion of the DCA's opinion could suggest PERC enjoys a wholesale exemption from Section 120.535. Created after the opinion in *Miami Lodge*, Section 120.535 would instead suggest that an agency has a duty to adopt such rules. *See also* §447.207(1), Fla. Stat. (1993) ("The commission shall, in accordance with chapter 120, adopt, . . . rules").

Would it have been too much to ask the agency to create a rules re-

continued...

CASE NOTES

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garding impasse resolution? Perhaps not. Consider: since "[i]t is apparently PERC's practice" to stay the proceedings, 19 Fla. L. Wkly D1820, how is rulemaking not practicable or feasible? With suitable regard for the rights of the union, county, and public safety, was it necessary to liken PERC to a court with *inherent* authority—exempt from Ch. 120 rulemaking—to take actions preserving its jurisdiction? Remember, once the court *implies* these powers, only the courts and Legislature (but not DOAH) can then bring them back into check since the agency "need not promulgate a rule." 19 Fla. L. Wkly at D1820.

Reading *Wiregrass, Citrus County* and other opinions, one senses that the protections of Section 120.535 will tend to yield to matters affecting the core of an agency's charge: matters such as jurisdiction, as in *Wiregrass* above; the guts of the agency's organic statute; genuine police power concerns, as in *Citrus County*; and other instances where enforcement of Section 120.535's promise would bump up against other public policies or special values. We are entitled to ask: Was this the bargain struck with the creation of Section 120.535? Don't look to *Citrus County* for the answer; the emergency nature of the case evidently did not let the parties inform the Court of this requirement.

* * *

Well, pass around the cigars! Congratulations, it's an opinion! Expectant litigants will be delighted to learn of the delivery of the holding in ***Matthews v. Weinberg*, 19 Fla. L. Wkly D2088 (Fla. 2d DCA 1994)**. And with *Matthews*, Section 120.535 may have finally left its infancy.

The *Matthews* court took plenary review of a circuit court order declaring unconstitutional a non-rule policy of HRS denying adoption rights to homosexual applicants, but upholding HRS' policy of prohibiting unmarried couples from becoming substitute care families. HRS had fostered both policies without adopting them as rules. (Note: Recent changes to HRS rules promise to clarity the agency's requirements for foster couples, but the *Matthews* petition was disposed of under older rules—grandfathered, if you will.)

On review, the Second DCA chose not to espouse on the rights of spouseless applicants, or on the rights of homosexuals to adopt in Florida. Instead, the Court found that "[b]y applying those policies and not following the rulemaking procedures prescribed in section 120.54, Florida Statutes (1991), HRS exceeded its delegated authority." 19 Fla. L. Wkly at D2089. This led to reversal, vacation, and instructions for the lower courts to fashion an appropriate remedy.

COMMENT: Many, perhaps, will intimate that the Court orphaned the larger issue concerning the constitutional adoption rights of homosexuals in favor of "small" procedural matters. Others will protest that the court merely followed the maxim that cases should be resolved on non-constitutional grounds, if possible. *McKibben v. Mallory*, 293 So.2d 48 (Fla. 1974). But while the constitutional pedigree of adoption rights is still unresolved, those hoping for something more from 120.535 now have custody of a powerful precedent.

At its heart, *Matthews* holds that an agency's failure to initiate rulemaking—at least where it is "feasible and practicable," §120.535 (1), Fla. Stat. (1993)—constitutes an invalid exercise of delegated legislative authority. But *Matthews* could also be read to state that an agency cannot apply policies it should have adopted as rule. With the creation of Section 120.535, the Legislature decided to use more stick than carrot to prod agencies into rulemaking. Reading *Matthews* to prohibit the application of non-rule policies would be consistent with this goal; additionally, it would help undo some of the damage caused by the opinion in *Florida Power Corporation v. Department of Environmental Regulation*, 19 Fla. L. Wkly D1076 (Fla. 1st DCA May 13, 1994) (approving of agency use of nonrule policies to reject hearing officer's findings).

In fairness to the agency, however, one should note a potential weakness in the *Matthews* opinion. Because the action started as a judicial declaratory proceeding—and not an administrative rule challenge or licensing hearing—HRS was never given an opportunity to demonstrate that it was impracticable or infeasible to solidify their policy as a rule. While such defenses are clearly the agency's burden, *see* §120.535(1), Fla. Stat. (1993) ("Rulemaking shall be *presumed* feasible and practicable . . .") (emphasis added), it is not evident the agency was given an opportunity to present such information. But in any event, the willingness of the *Matthews* court to raise Section 120.535 on appeal demonstrates a certain impatience for agencies that do not adopt rules. *See generally Mehl v. State*, 19 Fla. L. Wkly S16 (Fla. Dec. 23, 1993) (demonstrating some degree of impatience for an agency that has not complied with a statutory directive to engage in rulemaking; creating a limited evidentiary incentive to force agency into compliance). The *Matthews* Court's construction of Section 120.535 is more than a sheep in Wolf's clothing; there is a trend forming.

* * *

The engaging opinion in ***Tenbroeck v. Castor*, 19 Fla. L. Wkly D1656 (Fla. 1st DCA July 29, 1994)** is worth noting. There, the Court reviewed the appellant's challenge to disciplinary action taken against the teaching certificate.

The facts are provocative. Appellant had served, at the ripe age of 48, as an assistant principal at a Florida high school. There, he met a 15-year-old student. Her name was Angela. After a courtship of appropriate length (i.e., she turned 16), they were married with the blessings of Angela's father. During the courtship, suspicions were, um, aroused, but the school administration failed to find any evidence of misconduct. Nonetheless, like Donne's betrothal to Ann More, Appellant's decision to honorably marry the lass brought only indignation and scorn; the star-crossed lovers had crossed the local school board.

Charges were filed ("gross immo-

rality or an act involving moral turpitude"; Oh my!) alleging that appellant had improperly engaged in a relationship with the student prior to their marriage. One supposes the issue at hearing could have been stated as: Was the Appellant's interest in Angela akin (snicker) to Humbert's obsession in *Lolita*? The school board argued for the debauchery of Nabokov, while appellant plead the reserve of Trollope. At hearing, Angela's denial of any intimacy before their marriage was countered only with hearsay evidence comparing her to the likes of Salammbô and Madame Bovary.

Well. The hearing officer eschewed these subtleties and instead bluntly considered whether appellant had engaged in sexual relations (here, something of euphemism for gossip) supported the finding that Appellant was less than honorable in his courtship. But the First District found something suspicious (and salutary) in the salacious findings: "Speculation, surmise and suspicion cannot form the basis of disciplinary action against a teacher's professional license." 19 Fla. L. Wkly D1658. Without more, the Court would not hear of the hearings' hearsay holdings. Yet, perhaps out of a realization that love conquers all, the Court hastened to add that "[t]his opinion is confined to the facts presented in this case." *Id.*

COMMENT: As usual, the opinion from First District has deprived us of the juicier bits in the record. But aside from the engaging facts, the opinion is but one more in a long line of cases holding that hearsay cannot be the sole basis for a finding, but may instead only explain other substantive evidence. *E.g., DPR v. Isaacs*, 4 FALR 2754-A, 2754 (DPR Final Order, Sept. 21, 1982) (hearsay alone won't support finding); *DPR v. Gaines*, 5 FALR 403-A, 404 (DPR Final Order, Dec. 17, 1982) (same); *In re Social Security No. 266-64-7776*, 1 FALR 1291, 1291 (UC Final Order, 1979) (same) *Doran v. HRS*, 12 FALR 1307, 1308 (Fla. 1st DCA 1990); *Dade County School Bd. v. Dade Co. School Maintenance Employees Union*, 2 FALR 659, 660 (Recommended Order, Apr. 30, 1980) (holding that corroborated hearsay will support a finding); *In re Employer Account No. 239019*, 2 FALR 507-A, 510 (Recommended Order, August 3, 1979) (hearsay admissible, can't support a finding alone); *King v. HRS*, 1 FALR 749, 750 (Recommended Order May 21, 1979) (uncorroborated hearsay not capable of supporting finding); *Florida Real Estate Comm'n v. Sans*, 1 FALR 667, 668 (Recommended Order, May 8, 1978); *Toppino & Sons, Inc. v. DOT*, 3 FALR 131-A, 132 (Recommended Order Sept. 22, 1980) (hearsay can't be sole basis, citing *Pasco Co. Schl. Bd. v. PERC*, 353 So. 2d 108 (Fla. 1st DCA 1977)); *HRS v. Bergerson*, 12 FALR 2194, 2199 (DOAH Recommended Order, Dec. 15, 1989) ("Admissibility is allowed, but incorporation is not permissible without competent evidence which the hearsay evidence supplements or explains.").

With apologies to the happy couple, the author would like to note another reason to praise the First District's opinion: despite a detailed recitation of the facts, the Court did not once mention the name Buttafucco.

* * *

More than mere hearsay supported a pivotal finding in ***Cornwell v. Department of Health & Rehabilitative Services*, 19 Fla. L. Wkly D1803 (Fla. 1st DCA Aug. 26, 1994).** There, the appellant sought review of a final order terminating her Medicaid assistance and denying her application for Aid to Families with Dependent Children (AFDC) and Food Stamp benefits. The trouble started when appellant learned of a discretionary revocable trust started by her mother. Although started for the daughter's benefit, the trust assets were pledged as collateral for a recent bank loan to the mother, thereby rendering the monies "unavailable" to the appellant. The department's hearing officer disagreed, finding that the inaccessibility of the funds was merely hearsay. On appeal, the First District reversed, noting that appellant's own testimony about the funds was more than mere hearsay. Since appellant proved she did not have unrestricted access to the funds, the Court remanded with instructions to let the appellant eat cake.

COMMENT: The agency attempted to have appellant's cake and eat it too with its own hearsay suggestion that the appellant "caused or requested" that the funds become unavailable under Rule 10C-1.303(3).

* * *

The importance of being adversely affected was again noted in ***Bodenstab v. Department of Professional Regulation*, 19 Fla. L. Wkly D1803 (Fla. 1st DCA Aug. 26, 1994)**, where perceived injury to one's reputation occasioned by a rough and tumble (but successful) licensure proceeding was not enough to confer standing for appeal.

Appellant, an Illinois physician, had sought licensure in Florida from the Board of Medicine. Concerns about the doctor's educational background, alleged denial of hospital privileges and an alleged combative personality supported an initial decision to deny. Prior to hearing, however, the discovery of new information allowed the Board to reconsider. The new evidence resolved all of the Board's initial concerns, and a stipulation assured the doctor that the "name-clearing" evidence would be incorporated into their order granting a license. The Board then issued the license, but did not incorporate the new evidence in its order.

Appellant sought review, claiming that given the original denial, the order did harm to his professional reputation. The First District, however, noted that a person is "adversely affected by final agency action" for purposes of Section 120.68(1) appeal only by showing (1) the finality of the action; (2) the applicability of the APA to the agency; (3) the status of the appellant as a party; and (4) the adverse affect of the action on appellant. Since the doctor was granted a license, he was not adversely affected by the agency action. The Court paused to distinguish the authority in *Rabren v. Department of Professional Regulation*, 568 So. 2d 1283 (Fla. 1st DCA 1990) (allowing appeal of dismissal of charges, where order of dismissal contained adverse conclusions of law that affected appellant in related proceeding).

continued...

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COMMENT: Hmmm. A difficult case. The Court turned to the detailed opinion in *Daniels v. Florida Parole & Probation Comm'n*, 401 So. 2d 1351 (Fla. 1st DCA 1981) to extract its four-part standard for granting Section 120.68(1) review. Well enough, but it seems this case closely resembles *General Development Utilities, Inc. v. Florida Public Service Commission*, 385 So. 2d 1050 (Fla. 1st DCA 1980), where the appellant was not adversely affected by an order denying their constitutional challenges to a proposed rule, but nonetheless granting their relief and invalidating the rules because of a defective EIS.

* * *

While we are led to believe that available sources of ground water are becoming scarce in the Southwest District, it is abundantly clear that there is no drought of litigation. The Second District recently proved this true by pumping out the opinion in ***Smith & Williams, P.A. v. West Coast Regional Water Supply Authority*, 19 Fla. L. Wkly D1690 (Fla. 2d DCA Aug. 5, 1994)**. There the Court considered satellite litigation over attorney's fees under Chapter 119. Ironically, the fee litigation started over a public records request for information about attorney's fees. The water supply authority had originally claimed a work product privilege under section 119.07(3)(n), Florida Statutes (1991), to justify its decision to redact most of the notations included in their lawyers' bills. An in camera inspection of the notations revealed that only a few of them genuinely conveyed the "mental impression, conclusion, litigation, strategy, or legal theory" of counsel to warrant Section 199.07(3)(n)'s limited protections. The trial court found that disclosure of the notations was required, but that the Authority has not "unlawfully refused" the request under Section 119.12(1), Florida Statutes (1991), for purposes of awarding fees.

On review, the Second District found that the proper test was not whether the Authority "unlawfully refused" the request under Section 119.12(1), but rather when the Authority "improperly withheld" the materials under Section 119.7 (3)(n)—the portion of the records law addressing the limited privilege, and repeating the availability of a fee award. Section 119.07(3)(n) had a more lenient standard for the award of fees, one which fit hand and glove to the lower court's finding that the refusal was "improper."

COMMENT: The Court assumes that different standards for awarding fees were placed in Sections 119.07(3)(n) ("improperly withheld") and 119.12(1) ("unlawfully refused"). The legislative history seems somewhat indifferent to such a conclusion, but since both standards—"unlawfully refused" and "improperly refused"—came out of the same session, *see* Committee on Judiciary Staff Summary, PCB 44/HB 1266 (May 2, 1984), one may suppose the difference was intended to mean something. *See Bay Bank & Trust Co. v. Lewis*, 19 Fla. L. Wkly D499 (Fla. 1st DCA March 2, 1994) (presuming that change in Section 120.71 was intended to accomplish a change in meaning). Also, the court could have reached a similar result by merely noting that attorney fees are recoverable even when access is denied on a good faith but mistaken belief that the documents are exempt from disclosure. *News and Sun-Sentinel Company v. Palm Beach County*, 517 So. 2d 743 (Fla. 4th DCA 1987); *Times Publishing Co. v. City of St. Petersburg*, 558 So. 2d 487 (Fla. 2d DCA 1990).

But the Court's reasoning was not based on intent, or any novel argument. Instead, it found that "[a]ny other conclusion would render the attorney's fees language of section 119.07(3)(n) meaningless." 19 Fla. L. Wkly at D1691. To that extent, the Court's reasoning is unassailable. A cautionary note: In lowering the standard for awarding fees under Section 119.07(3)(n), the *Smith & Williams* opinion does not appear to raise the standard for awarding fees under Section 119.12(1).

* * *

Briefly Noted

The agency confessed error in ***Muldrow v. Department of Business & Professional Regulation*, 19 Fla. L. Wkly D1802 (Fla. 1st DCA, Aug. 26, 1994)**, where the Construction Industry Licensing Board reached a different conclusion as to the retroactive application of Section 489.129(1)(p), Fla. Stat. (1991). The appropriate remedy was a reversal, and remand with instructions to dismiss the complaint.

* * *

Ripples from the Supreme Court's decision in *Snyder* were felt in ***Section 28 Partnership, Ltd. v. Martin County*, 19 Fla. L. Wkly D1875 (Fla. 4th DCA Sept. 9, 1994)**, where a certiorari challenge was brought to a county's refusal to amend its comprehensive plan. The Court found that the particular proposed amendments constituted the "*formulation* of a general rule of policy," not the "*application* of such a rule." Since comp plan amendments were legislative in character, the lower court's decision to decline certiorari review was proper. Excelsior from the opinion includes: the fact that the requested amendments to the plan was a "site specific, owner-initiated rezoning" was not necessarily determinative; the size of the parcel (one square mile) was not necessarily determinative; but the location of the parcel (adjacent to "pristine" preserve and park areas) was determinative. So the *Section 28* holding helps flesh out the *Snyder* opinion by adding a new principle: land use adjacent to or impacting parks and preserve areas tend to involve questions of "policy," and "affect[] a large portion of the public," *Snyder*, 627 So. 2d at 474, thereby lending a legislative air to otherwise narrow decisions that affect only one specific parcel.

BRIEF COMMENT: A troubling opinion! Some tactical judicial notice was taken of the relative sizes of the parcel and the park/preserve areas. Also, the opinion did not recite record proof of how, exactly, the park and preserve would be affected by the development (thereby "affecting a large portion of the public" under *Snyder's* litmus test for legislative action). But since *Snyder* did not

fully answer questions of record, proof, and the sufficiency of even legislative findings, it seems judicial notice and the available record properly filled in the gaps here. Overall, the *Section 28* opinion may have raised more questions that it answered.

* * *

Charges of immorality, misconduct in office and gross insubordination or willful neglect of duties promised to make the case in ***Boulton v. Morgan*, 19 Fla. L. Wkly at D1777 (Fla. 1st DCA Aug. 24, 1994)**, somewhat interesting. But like the teacher's racially charged comments that prompted those chargers, the final order proved to be only sound and fury. Adequate proof of "insensitivity to racial sensitivity" had let a hearing officer recommend a modest penalty. The school board's attempt to pronounce a larger punishment stumbled over Section 120.57 (1)(b)10's requirement that the agency articulate proof contained in the complete record. Since the board adopted *in toto* the hearing officer's findings of fact, it could not thereafter modify the penalty where the increase was grounded on factual predicates not established in the RO. *See Friends of Children v. Department of Health & Rehabilitative Servs.*, 504 So. 2d 1345 (Fla. 1st DCA 1987) (holding improper an agency's supplemental findings of fact on an issue not addressed by the hearing officer); *Cohn v. Department of Professional Reg.*, 477 So. 2d 1039 (Fla. 3d DCA 1985) (same). Reversed and remanded.

COMMENT: Some authorities hold that the teacher's words alone are indeed actions worthy of punishment. *See generally* Ralph Waldo Emerson, *Essays, New England Reformers* xiii, "The Poet" ("Words are deeds and quite indifferent modes of the diving energy. Words are also actions, and actions kinds of words."). *But see* William Shakespeare *King Henry VIII*, Act III, sc. ii, 1.153 ("And 'tis a kind of good deed to say well. And yet words are no deeds.").

* * *

A hearing officer's order chock full of competent, substantial evidence deserved affirmance in ***Edwards v. Department of Health & Rehabilitative Services*, 19 Fla. L. Wkly D1753 (Fla. 3d DCA Aug 17, 1994)**. To similar effect, see the bid protest case of *Hubbard Construction Co. v. Department of Transportation*, 19 Fla. L. Wkly D2097 (Fla. 1st DCA Sept. 29, 1994), where the agency improperly rejected such findings.

COMMENT: Although the protections of Section 120.57(1)(b)10 are not unique to bid protest cases, the *Hubbard* opinion neatly gathers the bid cases on point. Very sharp!

* * *

The improper admission of evidence demonstrating criminal conduct in another jurisdiction may have contributed to a higher penalty in ***Kunen v. Department of Business & Professional Regulation*, 19 Fla. L. Wkly D1800 (Fla. 3d DCA Aug. 24, 1994)**. (The evidence was not properly noticed under Section 90.204, and was in any event not material.) Partial affirmance and partical reversal returned the matter to the agency to consider anew the penalty imposed.

* * *

The posting of a bond pursuant to Section 287.042(2)(c) in a bid protest action, Section 120.53(5)(b), Fla. Stat. (1992 Supp.), is not jurisdictional. The agency was therefore required to give notice to the party and a reasonable opportunity to make good. ***ABI Walton Insurance Co. v. Department of Management Services*, 19 Fla. L. Wkly D1905 (Fla. 1st DCA Sept. 8, 1994).**

* * *

An agency hearing officer was disqualified in ***World Transportation, Inc. v. Central Florida Regional Transportation Authority*, 641 So.2d 913 (Fla. 5th DCA 1994)**. Statements by the officer—a board member of the subject agency—"objectively demonstrate[d] bias and prejudice against" the petitioner.

COMMENT: Section 120.71 provided all the authority needed to create this "objective" test. The opinion comes one step closer to answering what quantum of proof is necessary to recuse a hearing officer. *Compare Bay Bank & Trust Co. v. Lewis*, 19 Fla. Law Wkly D499 (Fla. 1st DCA March 2, 1994) (stating that amendments to Section 120.71 created a higher standard for the recusal of hearing officers than judges).

* * *

Rules that "fit squarely within" their implemented statute, "add[ing] nothing whatsoever," are not an invalid exercise of delegated legislative authority. The subject rules, taking permanently affixed mobile homes out of the tax exempt status conferred to mobile homes, likewise did not violate Article VII, section 1(b) of the Florida Constitution. ***Florida Manufactured Housing Assoc., Inc. v. Department of Revenue*, 19 Fla. Law Wkly D1968 (Fla. 1st DCA Sept. 14, 1994).**

David Dagon lives and writes in Tallahassee, Florida, where he is taking advantage of the baseball and hockey strikes to work more on his chip shot, and complete bar applications to Georgia and Florida. As is evident from his regular column, the author thinks case notes should be something of a cross between a law review exegesis and an album review in Rolling Stone. *He discourages opinions different from his own, but will endeavor to see them published nonetheless.*

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

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Public Utilities Law Committee
Minutes of the Meeting
June 22, 1994

The meeting was called to order at 2:00 p.m., at the Marriott's Orlando World Center in Orlando. Present were: Tom Tart, Jim Stanfield, Robert Beatty and Karla Teasley.

As the first order of business the assembled committee was to select a chair-elect. Diane Kiesling was unanimously elected to this position. Laura Wilson, as reward for her great job in organizing the CLE program in April of this year, was also unanimously elected the chair of next year's CLE program currently scheduled to take place in April of 1995. In order to assist her in this effort, Jim Stanfield and Tom Tart agreed to contact speakers on electric issues (electric conservation programs which promoted the use of natural gas; the Conservation Goals Docket; last year's Territorial Bill); Bob Beatty agreed to find a speaker in the telephone area (Chapter 364 legislative select committee); and Karla Teasley agreed to find speakers for water issues (use of a uniform rate structure, FPSC jurisdiction over utilities whose service territories cross county lines, revision of the "used and useful" rules.

For the benefit of new members the merger of the section with the Administrative Law Section was discussed. There was also discussion about the benefits of continuing to maintain a separate subcommittee in light of the poor attendance at recent committee meetings. Although the CLE programs are always very well attended and received, the section needs more bodies in order to actually operate.

After a good deal of discussion, three suggestions were made. First, that a letter should be written to all registered members of the committee stating the concern about declining member participation and stating that the members needed to affirmatively indicate their willingness to actually participate in committee projects by contacting the chair. Second, contacting the chair of the Administrative Law Committee in order to secure the ability to continue to have a dedicated CLE for public utility issues if the section is disbanded. Third, try to elevate interest by having a luncheon and a speaker in connection with the meeting on September 19 in Tallahassee. It was determined that the committee would pursue the third suggestion before taking any further action.

Jim Stanfield also suggested that there were several FPSC practice issues that he thought the committee should discuss: 1) the ability to speak at agenda; and 2) modem access FPSC data, e.g., CASRs, document listings, commissioner assignments, etc.

The meeting was adjourned about 3:30 p.m.

Minutes
Administrative Law Section
Executive Council Meeting
Friday, September 23, 1994, Tallahassee, Florida

I. CALL TO ORDER

The meeting was called to order by Section Chair Vivian F. Garfein.

Members present: Stephen Maher, Johnny Burris, Vivian Garfein, Betty Steffens, Ralf Brookes, Mary Smallwood, Linda Rigot, Mike Ruff, Diane Tremor, Catherine Lannon, Carol Forthman, Suzanne Brown-less, Steve Pfeiffer, John Newton, Kathy Castor and Bill Williams.

Members excused: Veronica Donnelly and David Watkins.

Others in attendance: Jackie Werndli.

II. PRELIMINARY MATTERS

A. Consideration of the Minutes from the June 23, 1994, meeting: The minutes were approved as corrected to indicate that Mike Ruff's absence from the June 23, 1994 meeting was excused.

B. Treasurer's Report: Cathy Lannon reported an account balance of $32,300.

C. Report from the Chair: Vivian Garfein indicated that Linda Rigot will attend the Council of Sections meetings on behalf of the section.

III. COMMITTEE REPORTS

A. Long Range Planning Committee: Linda Rigot reported that the committee had met and had considered issues relating to the Constitutional Revision Conference and the Pat Dore Administrative Law Conference. The Long Range Committee Meeting set for today had been canceled. The Pat Dore Administrative Law Conference has been scheduled for February 3, 1994, and the Constitutional Revision Conference has been scheduled for February 6, 1994.

B. Continuing Legal Education: Carol Forthman reported that the Practice Before DOAH Seminar held at the last mid-year meeting had been successful, and had been scheduled to be held next on January 12, 1995. The Pat Dore Administrative Law Conference has been scheduled for February 3, the Constitutional Revision Conference for February 6, the Public Utilities Law Seminar for

April 7, and the Administrative Law Overview for May 12. A general discussion was held on the Section's policy for furnishing speakers to other sections holding seminars in order to split revenues. This issue will be explored further by the Committee with other sections such as the Appellate Law Section, the Labor and Employment Law Section, the Criminal Law Section and the Young Lawyers Section.

C. Publications Committee: Linda Rigot reported a delay in getting the latest newsletter out and will pursue the reasons for the delay. Several articles have been committed for the Florida Bar Journal, and only one article is still needed. The Administrative Practice Manual revision work is on schedule, and will meet the February 1995 publication deadline. Deadline for the next newsletter is November 15, 1994.

D. Legislative Committee: No report.

E. Pat Dore Distinguished Professorship Committee.

Vivian Garfein reported no recent progress, but indicated that the Committee will become active again after October. The fund is at approximately $50,000, and the Committee is considering contacting political candidates who have no opposition to attempt to obtain donations toward funding the professorship.

F. Model Rules Revision Committee: Steve Pfeiffer reported that a draft has been forwarded to the Administration Commission. He also furnished copies of suggested language concerning bid disputes for inclusion in the draft. There will probably be an October workshop in Tallahassee to consider the draft rules, and the Lieutenant Governor's Staff may try to include some of the legislative initiatives considered during the last session in the final version of the Revised Model Rules.

G. Pat Dore Administrative Law Conference: As noted above, the conference is currently scheduled for February 3, 1995, in Tallahassee, and plans are progressing toward filling out the program.

H. Public Utilities Law Committee: Suzanne Brownless reported on the committee's wish to cosponsor a CLE with the Competitive Energy Producers Association on January 20, 1995, in Tallahassee. The topic of the seminar will be "Electric Utility Industry in Transition." The Committee would be responsible for the cost of advertising the seminar, and would not intend to hold its regular April CLE. The seminar will be held at the Radisson in Tallahassee, and the Committee intends to split revenue from the seminar with CEPA. It was determined that the section would amend its budget to allocate up to $1,000 to the Committee to fund the workshop, and the Committee was to arrange to split gross revenues with CEPA.

I. Conference on the Florida Constitution: Steve Maher reported that he had arranged for the section to cosponsor this seminar, presently scheduled for February 6, 1995, in the Cabinet Room in Tallahassee, with the Collins Center and with the Council of Sections. The meeting room will allow for approximately 200 attendees, and an article will be published in the January issue of The Florida Bar *Journal* to promote the conference. All attempts will be made to hold down expenses. It was determined that CLE credit should be sought for attendance at the conference, that every effort should be made to at least recoup the Section's costs in putting on the conference, that books purchased with Section funds for use at the conference should be sold to generate revenue, and that only those persons seeking no CLE credit or who are otherwise "comped" be allowed to attend the conference without charge. Cost to attend the conference should be in line with the Section's other CLE programs. Details regarding the issues were referred to the Budget Committee for handling.

J. Membership Committee: Kathy Castor reported that as of September, 1994, the Section had gained approximately 45 members since 1993. The Section has grown to 875 members from 787 members in 1992, and 830 members in 1993. A general discussion was conducted concerning the advisability of establishing an affiliate member program for the Section. It was determined that such a program would require an amendment to the Section's bylaws and that The Florida Bar would have to be reimbursed for expenses in administering an affiliate program. It was unanimously approved to authorize Kathy Castor to draft a proposed amendment to the Section's bylaws to establish an affiliate membership program.

K. Ad Hoc Committee on Amicus Briefs: Mike Ruff reported that the Committee was to meet immediately following the Executive Council Meeting.

L. Council of Sections: Linda Rigot reported on her attendance at a Council of Section's meeting held on September 10. A proposal is being considered to provide for appellate mediation of workers comp and administrative law cases at the First District Court of Appeal. This Section previously opposed a proposal establishing mediation for administrative law and workers compensation appeals filed in the First DCA. The Appellate Practice and Advocacy Section is currently drafting proposed legislation to provide for mediation at the First District. It was determined that the Section would communicate with the Appellate Practice and Advocacy Section to express our concerns over the use of mediation with regard to administrative law proceedings at the appellate level.

It was also reported that the Council of Sections considered at length the question of certification. Apparently the Board of Governors feels that all areas of practice should be certified. The Local Government Law Section has asked for approval of a certification program with a broad definition encompassing areas of practice of members of this Section and the Government Lawyers Section with no prior notice to other affected sections. Approval of this request is currently in progress. Betty Steffens is to contact the Local Government Law Section to determine the status of their certification request.

Mary Smallwood agreed to represent the Administrative Law Section on the Public Relations Committee of The Florida Bar.

Jackie Werndli is to get copies of the Bench/Bar Report to all Executive Council members for review. A

continued...

MINUTES

from preceding page

decision on whether to respond to this report will be made at a later date.

The Administrative Law Section representative (Linda Rigot) will serve on the Long-Range Planning Committee of the Council of Sections.

IV. OLD BUSINESS
None.

V. NEW BUSINESS
A brief discussion was conducted concerning proposed division-alization of the First District Court of Appeals. Vivian Garfein will check for details on the proposal which will be the subject of further discussion at a later meeting.

VI. GENERAL DISCUSSION
None.

VII TIME AND PLACE OF NEXT MEETING
Friday, October 21, 1994
1:00 p.m.
Tallahassee

VIII. ADJOURNMENT: The meeting was adjourned at 3:45 p.m.

Minutes

Administrative Law Section Executive Council Meeting

Friday, October 21, 1994, Tallahassee, Florida

I. CALL TO ORDER
The meeting was called to order by Section Chair Vivian F. Garfein.

Members present: Ralf Brookes, Suzanne Brownless, Diane Tremor, Dave Watkins, Linda Rigot, Vivian Garfein, Bill Hyde, Steve Pfeiffer, Mary Smallwood and Bill Williams.

Members excused: Catherine Lannon, Stephen T. Maher, Johnnie C. Burris, Katherine Castor, Bob Rhodes, and Betty Steffens.

Others in attendance: Gary Stephens and Jackie Werndli.

II. PRELIMINARY MATTERS
A. Consideration of the Minutes from the September 23, 1994, meeting: The minutes were amended to reflect that the Public Utilities Law Committee does intend to hold its April CLE.

B. Treasurer's Report: None.

C. Report from the Chair: None.

III. OLD BUSINESS
A. *Mediation Proposal/Appellate Practice and Advocacy Section.* Gary Stephens reported that he had spoken to Steve Stark, a representative of the Appellate Practice and Advocacy Section, concerning a proposal to establish mediation of workers' comp and administrative law matters at the appellate level. It was reported that a written proposal exists but representatives of our section have not as yet seen a copy. We are not aware of what form the proposal is currently in, and do not know with certainty to what cases the proposal would apply. It was reported that proposed legislation is supposedly being drafted to fund mediation instead of new judgeships, but no one has seen a copy of any draft. Gary Stephens will follow up with representatives of the Appellate Practice and Advocacy Section and report to the Executive Council at a later date.

Vivian Garfein reported that she had spoken with Judge Charles Kahn of the First District Court of Appeal, who indicated that the First District has created divisions, and that Judges Kahn, Davis, Allen, Barfield and Zehmer were assigned to the division that will hear administrative law appeals. Senior Judges Shivers, Wentworth and Larry Smith are also available to sit as judges on these matters. Judge Kahn was asked and agreed to address the Administrative Law Section at the midyear meeting concerning division-alization and perhaps mediation of disputes at the appellate level.

B. *Constitutional Conference.* Vivian Garfein reported that the Collins Center is now involved in the sponsorship and organization of the Constitutional Conference, and that the Collins Center has received a $10,000 grant from the Bar Foundation to fund the Conference. The Collins Center will pay the Administrative Law Section for books we have previously purchased. There will be no charge and no CLE credit for attendance at the Conference, although it will be used as a means to attempt to raise funds for the Pat Dore professorship. The Collins Center will be in charge of advertising the conference, and the Administrative Law Section will be a cosponsor. In addition to the Collins Center and the Administrative Law Section, the Council of Sections will also cosponsor the conference.

C. *Appellate Court Rules Committee/Subcommittee Appointments.* Linda Rigot reported that Gary Stephens has agreed to apply for appointment to a subcommittee evaluating revising rules applicable to appellate proceedings. Linda Rigot has been contacted by Roy Wasson concerning names of persons who could assist in revising appellate rules applicable to appeals involving administrative law, planning and zoning, and local government issues. Linda has talked to Mary Smallwood and Jim Linn, who is chair-elect of the Local Government Section, concerning a list of potential appointees. Linda will also contact Dan Stengel to determine if he has any interest in serving on a subcommittee.

D. *Certification Proposal of Local Government Section.* It was reported that the Local Government Section certification proposal has been approved by the Board of Governors and will now go to the Committee on Legal Specialization and Education. The proposal apparently does not include state agency administrative practice, but will apply only to local

government administrative practice. The description of the area of certification contained in the Local Government Section proposal was drafted broadly, apparently in response to concerns from the Board of Legal Specialization. The proposal as drafted is now on track for approval by the Florida Supreme Court. It was determined that the Administrative Law Section should take all steps necessary to oppose the Local Government Section certification program to the extent it would include state administrative agency practice. Vivian Garfein will contact our Board of Governors liaison, Michael Easley, with regard to our concerns with the Local Government Section certification proposal. We will attempt to get the Board of Governors to delay sending the Local Government Section proposal to the Florida Supreme Court until it can be discussed further. Mary Smallwood will coordinate our concerns with the Environmental and Land Use Law Section.

IV. NEW BUSINESS: None.

V. TIME AND PLACE OF NEXT MEETING
Friday, January 13, 1995
8:30 a.m. to 11:30 a.m.
Miami Hyatt Regency

VI. ADJOURNMENT: The meeting was adjourned at 2:30 p.m.

Course No. 1105-5

The Administrative Law Section Public Utilities Committee and the Competetive Energy Producers Association present

The Electric Utility Industry in Transition

January 20, 1995 • Radisson Hotel • 415 N. Monroe Street • Tallahassee

8:45 a.m. - 9:00 a.m.
Late Registration

9:00 a.m. - 9:15 a.m.
Opening Remarks
Vicki Gordon Kaufman, CEPA Coordinator
Suzanne Brownless, Chair, Public Utilities Law Committee

9:15 a.m. - 9:45 a.m.
"The Role of Integrated Resource Planning in Florida"
Linda Loomis Shelley, Secretary, Department of Community Affairs

9:45 a.m. - 10:15 a.m.
"Retention of QF Protections in New Competitive Environment"
John J. Stauffacher, Director of Public Affairs, Destec Energy, Inc.

10:15 a.m. - 10:30 a.m.
Break

10:30 a.m. - 11:00 a.m.
"The California Experiment"
Kenneth K. Henderson, Director of Commission Advisory and Compliance Division, California Public Utilities Commission

11:00 a.m. - 11:30 a.m.
"How LG&E Has Positioned Itself for Competition"
Jeanine Hull, Vice President, LG&E Power Marketing, LG&E

11:30 a.m. - 11:45 a.m.
Break

11:45 a.m. - 12:15 p.m.
Luncheon (not included in registration fee)

12:15 p.m. - 12:45 p.m.
"Issues Shaping Florida's Energy Future"
Representative Jim Davis

CLER PROGRAM
(Maximum Credit: 3.5 hours)
General: 3.5 hours

Please keep a record of credit hours earned. RETURN YOUR COMPLETED CLER AFFIDAVIT PRIOR TO CLER REPORTING DATE (see Bar *News* label). (Rule Regulating The Florida Bar 6-10.5).

Course materials and Audio/Videotapes are not available for this presentation.

REFUND POLICY

Requests for refund **must be in writing and postmarked** no later than January 20, 1995. Registration fees are non-transferrable.

Register me for "The Electric Utility Industry In Transition", Friday, January 20, 1995.
TO REGISTER, MAIL THIS FORM TO: Competitive Energy Producers Association, c/o Suzanne Brownless, P.A., 2546 Blairstone Pines Drive, Tallahassee, FL 32301 with a check in the appropriate amount payable to Competitive Energy Producers Association. If you have questions, call Jackie Werndli, The Florida Bar, 904/561-5623. ON SITE REGISTRATION, ADD $10.00. Registration is by check only.

Name _____ Florida Bar # _____
Cannot be processed without this number.
Above your name on the *News* label

Address _____

City/State/Zip _____

(JW) Course No: 1105 5

( ) Seminar Registration: $60
( ) Luncheon cost: $10.50
( ) Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

The Florida Bar Administrative Law Section
presents

Pat Dore 1995
Administrative Law Conference

The conference will celebrate the 20th birthday of the revised state Administrative Procedure Act by presenting a spirited colloquy and debate focusing on recent legislative proposals to amend the APA.

February 3, 1995
Florida State Conference Center
555 W. Pensacola Street
Tallahassee, FL

Course No. 7516R

8:00 a.m. - 8:45 a.m.
Late Registration

9:00 a.m. - 9:15 a.m.
Welcome
Vivian F. Garfein, Florida Department of Environmental Protection
Chair, Administrative Law Section

Robert M. Rhodes, Steel Hector & Davis
Chair, Administrative Law Conference

9:15 a.m. - 10:15 a.m.
Legislative Overview of the Administrative Process
F. Scott Boyd, Joint Administrative Procedures Committee
Moderator

National Models
Dan R. Stengle, Florida Department of Community Affairs

Legislative Suspension of Agency Rules:
Point: *Professor Johnny Burris, Nova Southeastern University*
Counterpoint: *Dan R. Stengle, Florida Department of Community Affairs*

10:15 a.m. - 11:45 a.m.
Agency Rules
Steve Minton, Division of Administrative Hearings
Moderator

Donald A. Dowdell, Florida Department of Insurance

William L. Hyde, Gunster, Yoakley & Stewart

Kenneth G. Oertel, Oertel, Hoffman, Fernandez & Cole

G. Steven Pfeiffer, Apgar, Pelham, Pfeiffer & Theriaque

11:45 a.m. - 12:00 noon
Question and Answer Period

12:00 noon - 1:15 p.m.
Luncheon

1:15 p.m. - 2:45 p.m.
Panel - Administrative Hearings
P. Michael Ruff, Division of Administrative Hearings
Moderator

Carol A. Forthman, Cobb, Cole & Bell

David Gluckman, Gluckman & Gluckman

Lisa S. Nelson, Florida Department of Business and Professional Regulation

Thomas G. Pelham, Apgar, Pelham, Pfeiffer & Theriaque

2:45 p.m. - 4:15 p.m.
Regulatory Costs Assessments and Economic Impact Statements
David M. Maloney, Division of Administrative Hearings
Moderator
Jodi L. Chase, Associated Industries of Florida

Mary F. Smallwood, Ruden, Barnett, McCloskey, Smith, Schuster & Russell

Robert W. McKnight, Florida Chamber of Commerce

Daniel H. Thompson, Florida Department of Environmental Protection

4:15 p.m. - 4:30 p.m.
Question and Answer Period

4:30 p.m. - 5:15 p.m.
Oral Argument and Panel Discussion: Judicial Review of Rulemaking
Victoria L. Weber, Steel Hector & Davis
Moderator

Counsel:
Richard T. Donelan, Florida Department of Environmental Protection

William E. Williams, Huey, Guilday & Tucker

Judges, First District Court of Appeal:
Honorable James R. Wolf

Honorable Robert T. Benton, II

Honorable Marguerite H. Davis

Honorable Edward T. Barfield

5:30 p.m. - 6:30 p.m.
Reception

DESIGNATION PROGRAM
(Maximum Credit: 8.0 hours)
Administrative and
Governmental Law: 8.0 hours
General Practice: 8.0 hours

CLER PROGRAM
(Maximum Credit: 8.0 hours)
General: 8.0 hours

CERTIFICATION PROGRAM
(Maximum Credit: 4.0 hours)
Appellate Practice: 4.0 hours
Civil Trial: 4.0 hours

Credit may be applied to more than one of the programs above but cannot exceed the maximum for any given program. Please keep a record of credit hours earned. RETURN YOUR COMPLETED CLER AFFIDAVIT PRIOR TO CLER REPORTING DATE (see Bar *News* label). (Rule Regulating The Florida Bar 6-10.5).

ADMINISTRATIVE LAW SECTION
Vivian F. Garfein, Tallahassee — Chair
Linda M. Rigot, Tallahassee — Chair-elect
Carol A. Forthman, Tallahassee — CLE Chair
Robert M. Rhodes, Tallahassee — Program Chair

REFUND POLICY

Requests for refund **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable.

Register me for **"Pat Dore 1995 Administrative Law Conference"**, February 3, 1995 (053).

TO REGISTER, MAIL THIS FORM TO: The Florida Bar, CLE Programs, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar. If you have questions, call 904/561-5831. ON SITE REGISTRATION, ADD $10.00. **Registration is by check only.**

Name _____ Florida Bar # _____
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Address _____

City/State/Zip _____

(JW) Course No: 7516R

( ) Member of the Administrative Law Section: $50
( ) Non-section member: $70 (includes section membership)
( ) Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course materials must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

The Florida Bar Continuing Legal Education Committee
and the Administrative Law Section
present

Practicing Before the Division of Administrative Hearings

Course Classification: Intermediate

January 12, 1995 — Miami (live)
January 26, 1995 — Orlando (video presentation)
February 2, 1995 — Tallahassee (video presentation)

Course No. 7400R

1:00 p.m. - 1:25 p.m.
Late Registration

1:25 p.m. - 1:30 p.m.
Opening Remarks
Carol A. Forthman

1:30 p.m. - 2:20 p.m.
Rulemaking Proceedings and Challenges
Paul H. Amundsen, Tallahassee

2:20 p.m. - 3:10 p.m.
Administrative Law Update
Mary F. Smallwood, Tallahassee

3:10 p.m. - 3:30 p.m.
Break

3:30 p.m. - 4:20 p.m.
Representing Organizations and Public Interest Groups in Administrative Proceedings
Ralf G. Brookes, Key West

4:20 p.m. - 5:10 p.m.
Professional Licensing and Disciplinary Proceedings
TBA

FACULTY & STEERING COMMITTEE
Carol A. Forthman, Tallahassee — Chair
Paul H. Amundsen, Tallahassee
Ralf G. Brookes, Key West
Mary F. Smallwood, Tallahassee

ADMINISTRATIVE LAW SECTION
Vivian F. Garfein, Tallahassee — Chair
Linda M. Rigot, Tallahassee — Chair-elect
Carol A. Forthman, Tallahassee — CLE Chair

CLE COMMITTEE
G. Thomas Smith, Chair
Michael A. Tartaglia, Director, Programs Division

DESIGNATION PROGRAM
(Maximum Credit: 4.0 hours)
Administrative and
Governmental Law: 4.0 hours
General Practice: 4.0 hours

CLER PROGRAM
(Maximum Credit: 4.0 hours)
General: 4.0 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM
(Maximum Credit: 3.0 hours)
Appellate Practice: 2.0 hours
Civil Trial: 3.0 hours

Credit may be applied to more than one of the programs above but cannot exceed the maximum for any given program. Please keep a record of credit hours earned. RETURN YOUR COMPLETED CLER AFFIDAVIT PRIOR TO CLER REPORTING DATE (see Bar *News* label). (Rule Regulating The Florida Bar 6-10.5).

HOTEL RESERVATIONS

A block of rooms has been reserved at the Hyatt Regency Hotel, in conjunction with the Midyear Meeting of The Florida Bar at the rate of $118 single occupancy and $128 double ocupancy. Refer to the Reservation information appearing in the 11/1 Florida Bar *News*.

REFUND POLICY

Requests for refund or credit towards the purchase of audiotapes of the program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable. A $15 service fee applies to refund requests.

Register me for "Practicing Before the Division of Administrative Hearings"

TO REGISTER OR ORDER TAPES/MATERIALS, MAIL THIS FORM TO: The Florida Bar, CLE Programs, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar. If you have questions, call 904/561-5831. ON SITE REGISTRATION, ADD $10.00. **Registration is by check only.**

Name _____ Florida Bar # _____
Cannot be processed without this number.
Above your name on the *News* label

Address _____

City/State/Zip _____

(JW) Course No: 7400R

( ) Member of the Administrative Law Section: $75
( ) Non-section member: $90
( ) Full-time law college faculty or full-time law student: $45
( ) Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

I plan to attend (check one):

_____ **(24)** **Miami** (Hyatt Regency Downtown) (1/12/95)*
_____ **(68)** **Orlando** (Marriott Downtown) (1/26/95)**
_____ **(53)** **Tallahassee** (Center for Professional Development) (2/2/95)**

*Videotaping Session **Videotaped Presentation

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Private taping of this program is not permitted.

Delivery time is 4 to 6 weeks after the date of taping. PRICES BELOW DO NOT INCLUDE TAX.

_____ COURSE MATERIALS ONLY. Cost: $20 plus tax. TOTAL $_____

_____ AUDIOCASSETTES (includes course materials).
Cost: $75 plus tax (section member) $80 plus tax (nonsection member). TOTAL $_____

_____ VIDEOTAPES (includes course materials).
Cost: $150 plus tax (section member) $160 plus tax (nonsection member). TOTAL $_____

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continued...

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650 Apalachee Parkway
Tallahassee, FL 32399-2300

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INFORMATION SUPERHIGHWAY

from page 4

and manufacturing services. On the other hand, some long distance carriers, alternative access vendors or competitive access providers, and cable television companies want to be able to provide local telephone service, a monopoly now reserved to the LECs. No matter what the eventual legislation or judicial action on these issues, extensive regulatory, legislative, and judicial follow up proceedings are certain.

Who pays for the information superhighway and its infrastructure is critically related to this issue. Some companies have promised to replace existing copper wire networks with fiber optic cable, the transmission medium of choice for vast amounts of data. Others have promised to provide free connections or equipment for schools, medical facilities, and certain of the needy. Finally, an extensive, interconnected communications infrastructure already exists and is being expanded by telephone companies, cable television companies, and others to provide both wireline and wireless services. Again, whether regulators, the marketplace, or some combination of the two will control the construction, operation, and pricing of this superhighway infrastructure forebodes further legal work at the local, state, and federal levels.

In the final analysis, the legal profession will be deeply involved in and profoundly affected by the battles to provide, build, operate, and regulate the national information infrastructure. Whether the information superhighway is hype or business opportunity is up to you.