ADMINISTRATIVE LAW SECTION NEWSLETTER

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Veronica E. Donnelly, William L. Hyde, Co-editors

From the Chair

by Steven Pfeiffer, Chair

I hope you are not disappointed. You are probably reading this article because you are fascinated by Bar and Section politics. If you are, look elsewhere in this newsletter or come to the next executive council meeting. You will not read about it here. This is my first article as Chair of the Administrative Law Section. I intend to use this forum as an opportunity to discuss current issues in Florida Administrative Law. There are some weighty, controversial things being proposed. I want to talk about them. I want to stir the soup.

Surely, the most provocative innovation of Florida's 1974 Administrative Procedure Act was the creation of the Division of Administrative Hearings ("DOAH"). *F.S.* 120.65; "Reporters Comments on Proposed Administrative Procedures Act for the State of Florida, March 9, 1974," 3 *Fla. Admin. Practice Manual,* pp. 75, 79; Levinson, "The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendment," 29 *U. of Mia. L. Rev.* 617 (1975). DOAH offers an effective, independent forum for resolving the disputes that arise daily between citizens and administrative agencies. It is generally conceded that Hearing Officers at DOAH are fair, impartial, and intelligent. They are not, however, generally entrusted with making final decisions. In most instances, Hearing Officers enter recommended orders that must be submitted to the agency that has been involved in the dispute from the first instance for final action. *F.S.* 120.57 (1).

Whether the State and its citizens might be better served by making Hearing Officer's orders final, subject to appeal to the district courts by the unsuccessful citizen or agency, is a matter for fair debate. Indeed, legislation that would accomplish what was offered during the 1992 Legislative Session. Senate Bill 1674 (1992). It enjoyed impressive sponsorship including two former Senate Presidents, the President-Elect, and Senator Curtis Kiser, the Legislature's most vigorous advocate for Florida's administrative law process.

DOAH functions essentially as a pool of hearing officers. It provides a central core of professional quasi-judicial officers. They function independently of agencies and independently of the political process. While DOAH is administratively housed within the Department of Management Services, there is no line of authority from even that Department to DOAH. *F.S.* 120.65. The Director is appointed by the Administration Commission and confirmed by the Senate. She can be removed from office only by majority vote of the Governor and Cabinet. *F.S.* 120.65 (1). Hearing Officers are hired by the Director. *F.S.* 120.65 (4). Her decisions are not subject to confirmation. Hearing Offi-

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cers are classified as career service employees and enjoy all of the job protection that flows from that status. They have freedom from supervision similar to that of judges and even greater freedom from political interference.

Hearing Officers are not only independent; they are well qualified. The statute sets the same minimum qualifications as for circuit judges. *Fla. Const.* Art. VIII, s. 5; *F.S.* 120.65 (4). In practice, Hearing Officers' qualifications far exceed requirements that merely set a minimum period as members of the Bar. Donnelly, "Meet the Hearing Officers of the Division of Administrative Hearings," *Admin. Law Section Newsletter*, Vol. XIII, No. 2 (1991).

Given the independence of Hearing Officers and their impressive resumes, DOAH offers an opportunity for resolving disputes that is above the fray, detached from the parties, and smart. Still, in the overwhelming number of cases, we subject their orders to review by the agency that is involved in the dispute before judicial appeals can be pursued. The agency gets an opportunity to reinstate its own view of the dispute if it has failed to convince the Hearing Officer.

Senate Bill 1674 would have changed that. Section 5 of the Bill provides that Hearing Officers first enter "preliminary orders." These would be essentially the same as recommended orders in format. They would include findings of fact, conclusions of law, interpretations of administrative rules, and proposed penalties. The parties would have ten days to submit written exceptions to the preliminary order. The Hearing Officer could thereafter amend the preliminary order based upon the exceptions and would enter a final order. This order would constitute final agency action. It could be appealed to the appropriate district court of appeal in accordance with *F.S.* 120.68, by an unsuccessful party, which under the Bill, could include the agency.

The Bill would allow a prevailing party on appeal to be awarded attorney's fees if the court were to determine that the appeal was frivolous, meritless or an abuse of the appellate process.

Peculiarly, it would also allow attorney's fees if "...the hearing officer's action that precipitated the appeal was a gross abuse of the hearing officer's discretion." Presumably this would be an award against the Hearing Officer. While they are not the most poorly paid state employees, I doubt that many hearing officers could withstand this pop.

Senate Bill 1674 is the wrong approach to the issue of who should take final action. In my view there are proceedings in which Hearing Officers should enter final orders and proceedings in which agencies should retain the discretion to take final action. Frequently, agency action involves an exercise of discretion regarding policy choices. Conclusions of law often serve as a vehicle for choosing between distinct, legitimate alternative interpretations of statutory and rule provisions. Formal administrative proceedings afford not only a means to resolve disputes about what has transpired, but also a mechanism to decide what policy should apply, on the facts shown. *Department of Transportation v. Lopez-Torres,* 526 So.2d 674, 676 (Fla. 1988).

Administrative decisions are in part legal, but, when exercise of policy discretion is involved, they are also in part political. It is appropriate that policy choices be made as a final matter by elected or politically appointed and accountable officials rather than insulated, independent Hearing Officers. This is not to say that the formal hearing process cannot help the agency reach its conclusion. The courts have recognized that as one of the primary benefits the process offers. *McDonald v. Department of Banking and Finance,* 346 So.2d 569 (Fla. 1st DCA 1977); *Capeletti Brothers. Inc. v. Department of General Services,* 432 So. 2d 1359 (Fla. 1st DCA 1983). The hearing process can, and on many occasions has led an agency to change its mind about policy decisions. See *e.g., Florida Department of Transportation v. J.W.C. Co.,* 396 So. 2d 778 (Fla. 1st DCA 1981).

I believe the Section 120.57 (1) process does not need fixing. Formal hearings, factual determinations and recommendations regarding policy directions are indeed helpful to an agency that is developing policy prior to adopting rules. Still, the policy should be made by the agency, not by a Hearing Officer. Otherwise it will be difficult for an agency to pursue a consistent policy

course. Occasionally agencies have abused their role in addressing recommended orders. See e.g., *Short v. Florida Department of Law Enforcement,* 589 So.2d 364 (Fla. 1st DCA 1991); *Smith v. Department of Health & Rehabilitative Services,* 555 So.2d 1254 (Fla. 3rd DCA 1990); *Robinson v. Department of Administration, Division of Retirement,* 513 So.2d 212 (Fla. 1st DCA 1987). These unfortunate cases should not detract from a process that is working well. Hearing Officers are capable of blowing it too! See *e.g., Great American Banks. Inc. v. Division of Administrative Hearings,* 412 So. 2d 373 (Fla. 1st DCA 1981).

Placing decisions regarding policy choices with Hearing Officers rather than agencies is a fundamental change in the process that I consider unwarranted and inappropriate. There are proceedings, however, in which policy choices are not the determining factor. The Legislature has already determined that DOAH Hearing Officers should enter final orders in a variety of proceedings. Hearing Officers enter final orders in rule challenge cases, F.S. 120.535, 120.54(4), 120.56; in attorney's fees proceedings initiated under the Florida Equal Access to Justice Act, *F.S.* 120.57(1)11; in growth management proceedings in which land development regulations are challenged on the ground that they are inconsistent with a local government's adopted comprehensive plan, *F.S.* 163.3213; in exceptional student education proceedings, *F.S.* 230.23(4)(m)5.; in proceedings under the Baker Act which determine whether involuntarily hospitalized patients should be released *F.S.* 394.467(4); and in certain cases involving reinstatement of road contractors' eligibility to bid, *F.S.* 337.165(2)(d).

In many instances, especially those in which fundamental rights of citizens are involved, defining criteria justifying agency action should not be a discretionary policy issue that is resolved case-by-case, but instead should be a clearly defined statutory matter. For example, license revocation proceedings initiated by licensing boards are quasi-penal. *State ex rel. Vining v. Florida Real Estate Commission,* 281 So.2d 487 (Fla. 1973); *Sheppard v. Florida State Board of Dentistry,* 369 So.2d 629 (Fla. 1st DCA 1979). Depriving a citizen of his livelihood should not depend on emerging policies or interpretations of agency rules that are other than very clear. Perhaps these proceedings would be better decided finally by Hearing Officers. Indeed, many licensing boards have had difficulty appreciating their role in reviewing recommended orders. *Nest v. Department of Professional Regulation, Board of Medical Examiners,* 490 So.2d 987 (Fla. 1st DCA 1986); *Purvis v. Department of Professional Regulation. Board of Veterinary Medicine,* 461 So.2d 134 (Fla. 1st DCA 1984); *Borovina v. Florida Construction Industry Licensing Board,* 369 So.2d 1038 (Fla. 4th DCA 1979).

The issue of who should decide, as a final matter, what an agency is going to do should be addressed from the perspective of who will make the best decision. Undoubtedly there are some decisions that are better made finally by Hearing Officers. Baker Act continued hospitalization decisions are a clear example. Whether proceedings should be put in the hands of Hearing Officers rather than agencies should be explored process-by-process. Before a fundamental change such as proposed in Senate Bill 1674 is enacted, there should be a clear sense that the process is not working. The facts may support that conclusion with regard to some processes, but not with regard to the entire realm of administrative law in Florida.

It would be helpful to develop criteria to be used in addressing whether a given decision should be made finally by a hearing officer or by an agency. In applying this criteria, one principal should not be disturbed: Determining facts is not a policy-making nor a political matter. Facts determined by Hearing Officers should not be disturbed unless they are not supported. That is what the Administrative Procedure Act provides now *[F.S.* 120.57(1) (b) 10], and it is a fundamentally important aspect of the process that should not be disturbed. With that firmly in mind, I suggest the following questions should be addressed in evaluating final order authority with regard to discrete processes:

1. Is the decision one that is penal in nature? If it is, there is less justification for leaving policy-making decisions to be resolved case-by-case.
2. Is the decision one that involves determinations that set significant policy

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directions by an agency? If it is, the agency ought to have the final opportunity to determine policy issues addressed in the proceeding.

3. History is the best teacher. If an agency has a history, revealed in judicial decisions, of failing to meet its obligation to defer to findings of fact set out in recommended orders, then it may be appropriate to place final agency action with the Hearing Officer.

It is virtually certain that the nature of Hearing Officer's orders will be addressed again in the 1993 Legislative Session. If it is, I suggest that it be addressed process-by-process.

If you have thoughts about this or other pertinent subjects, we would like to hear from you. The Administrative Law Section will be delighted to provide a forum for your views, however odd, in this publication.

Presumptions

by William Furlow
Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, Tallahassee

The purpose of this article is to offer constructive observations regarding statutory presumptions that apply in the administrative procedure process from someone who spends a significant amount of his law practice in the administrative litigation trenches. Because my interest in presumptions is in the context of litigation, "presumption" as discussed in this article refers to "evidentiary presumptions".

Last year, the First District Court decided a very important case dealing with evidentiary presumptions in the context of administrative proceedings. In *McDonald v. Department of Professional Regulation, Board of Pilot Commissioners*, 582 So.2d 660 (Fla 1st DCA 1991), the Court discussed a number of issues relating to evidentiary presumptions. Before discussing *McDonald*, however, a general review of presumptions will lend to a better understanding of the First District's holding.

A presumption is "... an assumption of facts which the law makes from the existence of another fact or group of facts found or otherwise established".[1] A presumption is "... a rule of law fixed and relatively defined in its scope and effect that attaches to certain evidentiary facts and produces specific procedural consequences.[2] An inference, on the other hand, is "... a deduction of fact that the fact finder, in his discretion, may logically draw from another fact or group of facts that are found to exist or are otherwise established in the action.[3] An inference "... is regarded as a permissible deduction from the evidence before the court that the jury may accept or reject, or accord such probative value as it deserves..." .[4]

Presumptions are generally, but not necessarily codified. The presumption of impairment if a driver has a blood alcohol level of over .10[5] is codified, while the presumption of innocence in a criminal trial is not. Inferences are much less apt to be codified, but are usually logical deductions that a trier of fact can make based upon his life experiences, such as, if a person drinks alcohol excessively, and then becomes involved in a motor vehicle accident, it is reasonable to infer that the person was "driving under the influence" and probably caused the accident.

A presumption may be either conclusive or rebuttable. A conclusive presumption must be designated as such by law, such as the conclusive presumption of informed consent for an HIV test if the insurance company uses an approved informed consent form.[6] All other presumptions are rebuttable.[7]

The two types of rebuttable presumptions set forth in the Florida Evidence Code are the presumption affecting the burden of producing evidence and the presumption affecting the burden of proof. The former being the type of presumption that disappears once competent evidence is introduced tending to disprove some of the underlying facts to the presumption, and the latter be-

ing the kind of presumption that lingers on even after such countervailing evidence is introduced.[8] The latter type of presumption is usually associated with statements of public policy and shifts the burden of proof on that particular issue. For example, in the case of the blood alcohol level being greater than .10, the presumption of impairment shifts the burden of proof to the defendant to show that he was not impaired, notwithstanding the .10 blood alcohol level. Although the two types of presumptions are defined in the evidence code only in the context of civil actions, a strong argument could be made that those definitions also apply in administrative hearings.

The Florida Statutes contain well over 100 presumptions, most of which are rebuttable. In some instances the Statutes use the words "prima facie" when establishing a presumption although the terms are not properly interchangeable. Many of the statutory presumptions were created in an apparent effort to make it easier for agencies to perform their functions.

Presumptions can only be created by the legislature or the courts, not by an administrative agency.[9] That prohibition is not universally recognized, as it is common to find presumptions in the rules and unwritten policies of some agencies, without statutory authorization.

A line of cases exists in Florida which hold that an evidentiary presumption is not valid unless it meets a two-pronged test: First, there must be a rational connection between the fact proven and the fact presumed, and, second, there must be an opportunity to fairly rebut the presumption.[10] Obviously, however, the second prong would not apply in the case of a conclusive presumption. Instead, the validity of a conclusive presumption is evaluated in terms of basic due process.

Due process requires, for example, that when a person is denied a benefit based upon a conclusive presumption which is not necessarily or universally true, that person must be permitted to present evidence that establishes his right to the benefit.[11] Irrebuttable presumptions must be subjected to the closest scrutiny because they threaten basic constitutional rights of those presumed against.[12] In *Vlandis v. Kline*, 412 U.S. 441 (1972), the United States Supreme Court considered the constitutionality of an irrebuttable presumption which conclusively presumed that students who were nonresidents at the time of application to a state university were nonresidents for the entire time of attendance, for purposes of paying tuition. The Supreme Court held the statutory presumption invalid on the basis that the presumption was "not necessarily or universally true in fact" and because the state had "reasonable alternative means of making the crucial determination" of residence, and held that due process required that the state allow an individual an opportunity to present evidence demonstrating that he is a bona fide resident entitled to in-state rates.

Turning now to the new *McDonald* case, the issue was whether the Department of Professional Regulation could rely on an evidentiary presumption in a license disciplinary case in the absence of any direct evidence of the fact which was presumed, and in the absence of a statute authorizing the use of the presumption. In a word, the answer is "no".

McDonald was a licensed harbor pilot who was piloting a ship that struck the side of a channel while executing a turn. McDonald was charged by administrative complaint with being negligent in his piloting of the ship. At the formal hearing, DPR introduced evidence that McDonald was, in fact, piloting the ship at the time of the collision, that the ships rudder did, in fact, hit the side of the channel, and that under maritime law, when a ship goes outside of the channel, absent exigent circumstances, there is a presumption of negligence. DPR offered no evidence of any specific act of negligence by McDonald. The hearing officer accepted DPR's argument concerning the presumption of negligence, as did the Board. A final order was entered finding McDonald guilty and imposing discipline. McDonald appealed.

The First District reversed holding that there was an absence of statutory authority for the use of the presumption of negligence. The district court remanded to the Board with instructions to re-evaluate the evidence or take new evidence to determine whether or not there was proof, independent of the presumption, of any negligence on the part of McDonald.

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PRESUMPTIONS

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In a cogent and well-reasoned concurring opinion, Judge Zehmer explained why the case simply should have been dismissed rather than being remanded. Judge Zehmer correctly pointed out that nothing in the administrative complaint alerted McDonald to the fact that DPR was going to depend upon a presumption of negligence. The administrative complaint only charged that McDonald "...personally directed the vessel to be towed across the channel when it collided with the west bank of cut D channel and caused 'extensive damage' to the rudder and steering system; that this allision was due to *his negligent* failure to ensure that the vessel did not overstand sternward to the point she crossed the channel and contacted the west bank and that *his conduct was negligent because it constituted a disregard of safe practices in violation of acceptable standards of safe pilotage.*"

Judge Zehmer pointed out that DPR had failed to prove its case. The only way DPR could have proven that McDonald did not meet the applicable standard of care, would have been through the use of an expert, who could have established the standard of care and how that standard had been violated by McDonald. Since a license disciplinary case is penal in nature, mandating strict construction of disciplinary statutes against the enforcing agency,[13] and, since the burden of proof in a license disciplinary case is "clear and convincing " evidence,[14] the heavy burden of proof falls squarely upon the agency to prove the properly alleged violation. Accordingly, because DPR failed to meet that burden of proof, McDonald should have won the case.

Presumptions are sometimes difficult to identify or classify. In an effort to make its job easier, an agency sometimes will create a presumption that can be a trap for the unwary. A good example of this is Section 409.913, Florida Statutes, the Medicaid enforcement statute. Although cleverly disguised, a presumption there lurks and is ready to pounce upon any unsuspecting Medicaid provider. Here is how it works: HRS decided a few years ago that it was too difficult to audit Medicaid providers by evaluating the validity of individual claims. Instead, the agency decided it would try a new auditing approach in which it would compare the provider's purchases of inventory during a period of time, with that provider's billings to the Medicaid program (for goods delivered to Medicaid recipients) for that same period of time.[15]

Although the statute never uses the word "presumption" it creates a presumption that if the provider billed the agency for a greater quantity of goods than it can show that it purchased during that same period of time, then the excess quantity of goods must never have been actually delivered to the Medicaid recipient, and if the provider has already been reimbursed for those goods at the time of the audit, then it must have been overpaid and must now refund that amount to the Medicaid program. On its face that presumption is invalid as it fails to meet both prongs of the test for an evidentiary presumption set forth supra. As pointed out by the First District in the *Southpointe* case (see footnote 13), there are many reasons why a provider might be able to deliver more goods than it had purchased during a given period of time, including fluctuations in inventory, bulk purchases, lost invoices, barter etc. Additionally, according to the statute, unless the provider offers evidence of inventory acquisition in the form of "documents kept in the ordinary course of business", the provider is precluded from rebutting the presumption. Under certain conditions, then, that presumption becomes a conclusive presumptions and should be measured against the more stringent standards of constitutional due process.

This example is the most egregious misuse of an evidentiary presumption which I could find in a quick review of the Florida Statutes, but I am certain that there are others which suffer from the same infirmities. The validity of any presumption should be evaluated and challenged on a case by case basis in the context in which it is being applied.

Footnotes

[1] Section 90.301, Florida Statutes.

[2] McDonald v. Department of Professional Regulation, Board of Pilot Commissioners, 582 So.2d 660 (Fla. 1st DCA 1991).

[3] 1979 sponsor's note to Section 90.301, Florida Statutes.

[4] *McDonald*, supra.
[5] Section 316.1934, Florida Statutes.
[6] Section 627.429(4) (b), Florida Statutes.
[7] Section 90.301, Florida Statutes.
[8] Sections 90.302, 90.303, and 90.304, Florida Statutes.
[9] B.R. and W.C. v. HRS, 558 So.2d 1027 (Fla. 2d DCA 1989).
[10] B.R. and W.C. v HRS, 558 So.2d 1027 (Fla. 2d DCA 1989); Cunningham v. Parikh, 472 So.2d 746 (Fla. 5th DCA 1985); Straughn v. K and K Land Management, Inc., 326 So.2d 421 (Fla. 1976; Goldstein v. Maloney, 57 So. 342 (Fla 1911).
[11] Vlandis v. Kline, 412 U.S. 441 (1972).
[12] Stanley v. Illinois, 405 U.S. 645 (1972).
[13] Federgo Discount Center v. Department of Professional Regulation, Board of Pharmacy, 452 So.2d 1063 (Fla. 3d DCA 1984).
[14] Ferris v. Turlington, 510 So.2d 292 (Fla.1987).
[15] See Southpointe Pharmacy v. HRS, __ So.2d __ (Fla. 1st DCA 1992) case no. 91-451, opinion filed March 11, 1992, for a more detailed description of the "aggregate analysis' auditing method. See also, David's Pharmacy v. HRS, 11 FALR 2935 (HRS 1988).

The Nondelegation Doctrine: Rusty From Disuse?

by William L. Hyde, Co-Editor
Peeples, Earl & Blank, Tallahassee

It goes almost without saying that if the terms and provisions of a statute committed by the legislature to an agency to administer are plain, there is no room for administrative interpretation. *See, e.g., Kimbrell v. Great American Insurance Company,* 420 So. 2d 1086 (Fla. 1982). Rare, however, in these bureaucratic days is the plainly worded statute. Moreover, as the great Justice Traynor once observed, "[p]lain words, like plain people, are not always so plain as they seem." Traynor, "No Magic Words Could Do it Justice," 49 Calif. L. Rev. 615, 618 (1961). What consequences does this have for the practice of administrative law, and what, if anything, should be done to ameliorate those consequences?

It has long been an accepted principle of statutory construction that an administrative agency's construction of a statute it is charged with administering should be given great weight and should not be overturned unless clearly erroneous. *See, e.g., Department of Professional Regulation v. Durrani,* 455 So. 2d 515 (Fla. 1st DCA 1984). Florida's courts have also extended this deference to an agency's factual determinations in adjudicatory proceedings arising under section 120.57, Florida Statutes, where those determinations are "infused by policy considerations for which the agency has special responsibility." *McDonald v. Department of Banking and Finance,* 346 So. 2d 569, 579 (Fla. 1st DCA 1977). This deference, it seems, finds particular expression where the agency "is making predictions, within its area of special expertise, at the frontiers of science." *Island Harbor v. Department of Natural Resources,* 495 So. 2d 209, 218 (Fla. 1st DCA 1986), quoting with approval *Baltimore Gas and Electric Company v. Natural Resources Defense Council,* 462 U.S. 87, 103 (1983).

This judicial deference to the executive's interpretative powers finds its most extreme expression in cases such as *Rust v. Sullivan,* 111 S. Ct. 1759 (1991), where the United States Supreme Court upheld new regulations prohibiting Title X projects from engaging in counseling concerning, referrals for, and activities advocating abortion as a method of family planning. While much of the controversy surrounding this decision focused on its First Amendment and abortion rights implications, what is far more interesting (at least from the perspective of an administrative law practitioner) is Chief Justice Rehnquist's use of and elaboration upon the statutory construction principles noted above to justify the majority's ruling. And what is remarkable in this statutory construction analysis is not that the language of the statute at issue was ambiguous (it clearly was) or that its legislative history could support either of the litigants' positions (it apparently did), but that the new regulations reversed a longstanding agency policy, developed under a prior administration, that permitted nondirective counseling and referral for abortions. In other words,

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NONDELEGATION DOCTRINE

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the new regulations effected a total reversal of policy, yet the underlying statute remained unchanged.

Quoting *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-864 (1984), Rehnquist rejected the argument that because of this reversal of policy the prior policy was invested with some presumption of correctness and instead held that it was the revised interpretation that deserved deference because "[a]n initial agency interpretation is not instantly carved in stone" and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."

When divorced from the abortion rights and First Amendment implications of *Rust v. Sullivan,* this confluence of statutory construction and administrative law principles does not appear, at first, to be particularly noteworthy. I would suggest, however, that it is noteworthy, for it reminds us that the nondelegation doctrine has little, if any, import in federal law and is suggestive of how Florida's still viable nondelegation doctrine can be progressively undermined through carelessness or inattention.

Under the Florida doctrine, a legislature may not, except when authorized by the Florida Constitution, delegate its legislative power, i.e., the power to enact laws, declare what the law shall be, or exercise an unrestricted discretion in applying a law, to the executive. *See, e.g., Florida Welding & Erection Services, Inc. v. American Mutual Insurance Company,* 285 So. 2d 286 (Fla. 1973). Rather, the legislature must enact a law complete in itself and may expressly authorize designated officials in the executive branch, within definite valid limitations, to provide rules and regulations for the complete operation and enforcement of that law. *Id.* In other words, no matter how laudable a piece of legislation may be in the minds of its sponsors, objective guidelines and standards must still appear expressly in the legislation or be within the realm of reasonable inference. *High Ridge Management Corporation v. State,* 354 So. 2d 377 (Fla. 1977).

This evolving doctrine of a judicial deference to the executive's construction of a statute or to the executive's policymaking in adjudicatory proceedings (which can be, and often is, the same thing), when taken to its logical extremes (as some courts are now doing), may so undermine the nondelegation doctrine that it is rendered a mere ephemera. As the Florida Supreme Court once observed, the authority of "an administrative agency to 'flesh out' an articulated legislative policy is far different from that agency making the initial determination of what the policy should be," *Askew v. Cross Key Waterways,* 372 So. 2d 913, 920 (Fla. 1979), but that is what administrative agencies are being allowed to do under the guise of judicial deference to those agencies' interpretation of the statutes entrusted to their care to administer and enforce. That is exactly what occurred in *Rust v. Sullivan,* for Chief Justice Rehnquist's majority opinion essentially admits that Congress had not definitively spoken to the issue. Instead of making Congress speak to the issue, as the nondelegation doctrine would require, Rehnquist says that the executive, in the first instance, may do so. In other words, the executive can make the law; in the absence of a legislative mandate to the contrary, it appears, the executive can become a de facto legislative body. The authors of *The Federalist Papers* would be horrified by this notion.

If the courts may not substitute "judicial cerebration" for the law or require the enforcement of what they think the law should be, 49 Fla. Jur. 2d, Statutes § 110 (1984), then why should the executive, in effect, be allowed this seeming privilege? It is the legislature, after all, not the executive, to which our federal and state constitutions commit the basic responsibility, to make the tough policy choices and determinations for our state's and nation's laws, and it should not be allowed to avoid that constitutional responsibility by punting it to the executive branch. The judicial branch, too, should not shirk from its constitutional responsibility to insure that the legislative branch exercises that responsibility and that the executive not usurp that role.

Would rigorous enforcement of the nondelegation doctrine make for better, more comprehensible, and less ambiguous laws? The answer is obvious: It surely would, and

there is a wealth of evidence in support of this very proposition. For example, in *Askew v. Cross Key Waterways, supra*, the Florida Supreme Court declared invalid the Florida Legislature's first attempt to develop statutory standards and criteria for "areas of critical state concern." Was that legislation's regulatory goal frustrated? Yes, but only temporarily, because the legislature went back to the drawing board and enacted a new statute that better spelled out the standards and criteria the legislature wished the executive to employ in administering that regulatory program. In other words, the legislature was forced to make, and did make, the tough policy determinations that it is supposed to make, hardly a radical proposition.

Rigorous application of the nondelegation doctrine, of course, has its costs. It may, and often does, render the achievement of a legislative consensus on a particular bill more difficult because the bill will no longer be as susceptible of meaning different things to different people (and thus more easily achieve passage). On the plus side, however, a bill subject to such scrutiny will or should mean, as close as is possible, one thing to all people, thereby obviating or lessening the need for later executive and/or judicial reflection on just what the legislature meant in adopting that statute.

Is it too much to expect the legislature to not only mean what it says but to say what it means? To some proponents of the modern bureaucratic state, it apparently is. Complex regulatory matters are, it seems, beyond the ken of the ordinary legislator's ability and comprehension. It is far better, they argue, to simply to say to the executive: "Go forth and regulate," and be done with it. I must disagree, not only because I believe such notions to be fundamentally undemocratic, but also because I believe that where a regulatory policy cannot be adequately explained to, or is beyond the comprehension of, the legislature, more likely than not there is something wrong with that policy, not with the legislature. So, what should be done? To me, the remedy is that both administrative law practitioners and Florida's judiciary should give the nondelegation doctrine its due. Instead of engaging in mystical exercises of statutory construction, be it the doctrine of contemporaneous administrative construction or some other canon of statutory construction, practitioners should recognize an insufficiently detailed statute for what it is and not attempt to give it flesh where there are no bones. Florida's courts, too, when presented with such arguments, should not attempt to ascertain meaning and intent where there is precious little evidence of either but should insist that the legislature perform its constitutional duty to write a readily comprehensible and sufficiently detailed statute.

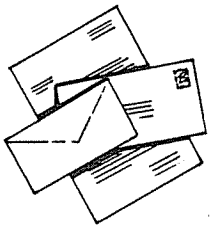
Participate in Section Functions

by Steven Pfeiffer

The Administrative Law Section plans an active year. Our activities will be more successful if we have broader participation from the membership. The following committees of the Section could use help

1. The Continuing Legal Education Committee, chaired by William Dorsey [(904) 488-9675].
2. The Publications Committee, chaired by Linda Rigot [(904) 488-9675].
3. The Membership Committee, chaired by Cathy Castor [(904) 488-0410].
4. The Pat Dore Distinguished Professorship Committee, chaired by Vivian Garfein [(904) 488-9730].
5. The Administrative Law Conference Committee, chaired by William Williams [(904) 224-7091].
6. The Model Rules Revision Committee, chaired by Steve Pfeiffer [(904) 488-0410].

I invite you to contact me or the committee chairs if you are interested in working with these programs. We want to hear from you. I know that you will find participation in the Section's activities rewarding.



Letters

The Honorable James R. Wolf
District Court of Appeal
First District, State of Florida
Tallahassee, Florida 32399-1850

Proposal for Settlement Conference Program

Dear Jim:

This will follow up on the discussion at the Florida Bar annual meeting concerning your preliminary consideration of a program to encourage settlement in selected cases, predominantly from the Workers' Compensation and Administrative Law fields. We appreciate the time which you afforded us to review the background materials and to offer our comments.

The views which I expressed during the Executive Council meeting, as well as those that follow, are my own and do not reflect any official position of the Section. I offer these remarks in the context of some fifteen years of involvement in administrative and governmental affairs in both the public and private sectors. If it has any bearing on this subject, I have maintained a Florida Bar designation in Appellate Practice and have been certified as both a mediator and arbitrator under Florida Supreme Court applicable rules.

The central theme of my comments is that a mandatory settlement program at the appellate level of Florida's judicial system is in appropriate. I would prefer to see additional judges, jurisdictional changes or other measures designed to enhance the effectiveness of the First District in lieu of measures designed to cause parties to forego their right to a fair and competent decision on the merits of the record developed below.

The posture in which parties arrive before the appellate court is significant. In the first place, both parties and their counsel have already had numerous opportunities, formal and informal, to resolve their differences. Secondly, having failed to do so, they have utilized judicial resources below, either to formulate a judicial opinion or to approve an outcome supported by an evidentiary record. Under most circumstances, one party will have lost while the other has won, with the loser most likely playing the role of appellant. It is difficult to see why the party favored by the court's ruling below must now endure additional expense and inconvenience to engage in further settlement discussions on the heels of judicial victory. The uneven posture of the parties also undermines a characteristic relied upon in productive settlement negotiations, namely, the parties have an equal incentive to achieve a negotiated outcome. Instead, we have one party who is very pleased with the present state of affairs and has a judicial order in support of it, and another party whose legal position has been altogether rejected.

Finally, I would urge you to explore the full range of prerogatives available for dealing both with the lower courts within the First District and with appellate counsel to discourage the utilization of judicial labors for trivial matters and to facilitate the timely resolution of well-taken appeals. I am a believer in all of the procedures associated with alternative dispute resolution but consider the imposition of same at the appellate level unseemly. I hope you will continue to include me on your mailing list and keep me advised of developments in this field.

Immediate Past Chair
Administrative Law Section

Editor's Note: The position taken by Gary Stephens in his August 14, 1992 letter to the Honorable James R. Wolf regarding the proposed settlement conference program was adopted as the section's position at the executive council meeting on September 18, 1992.

Section Pledges to Endow Chair In Memory of Professor Pat Dore

The Administrative Law Section of The Florida Bar has pledged to raise $100,000 to establish an endowed professorship in memory of FSU College of Law professor, Patricia Ann Dore. State matching funds will be sought by the College of Law to create a $150,000 endowment to fund the professorship in perpetuity. The endowment will be used to support teaching, research and writing in Florida Administrative Law.

Dore, who served on the law school faculty from 1970 until her death in January, was a widely known and highly respected expert on Florida Administrative Law. She played a key role in the development, enactment and revision of the Florida Administrative Procedure Act. She also served as a consultant to the Constitutional Revision Commission in 1978, drafting Article I, Section 23 of the Florida Constitution, commonly known as the privacy act.

Professor Dore touched the lives of many in the state through her teaching, writing and active involvement in the legislative process. She was also very active in the Administrative Law Section, particularly in the Administrative Law Conference, which is held annually. That annual conference has been renamed the Patricia Ann Dore Memorial Administrative Law Conference in her honor.

The decision to lead the drive to endow a named chair was made not only to honor Professor Dore's memory, but also to continue her work. The Section hopes that the endowment will help ensure the College of Law's continuing commitment to teaching and scholarship in the area of Florida Administrative Law.

Those who wish to contribute to the endowment fund that has been established at the Florida State College of Law should contact Linda Harris, who is at the law school. She may be reached at the following telephone numbers: (904) 644-7491 or 644-7286.

Vivian Garfein chairs the Section's Pat Dore Distinguished Professorship Committee and may be reached at (904) 488-9730.

New Edition of Florida Administrative Practice Coming In Early 1993

The Florida Bar CLE Publications currently is preparing a 4th edition of FLORIDA ADMINISTRATIVE PRACTICE, that will be available in early 1993. The new edition will update all existing chapters with legislative and case law changes through 1992. In addition, the manual will include an appendix with the Administrative Procedure Act, the Model Rules, and the DOAH Rules.

The Administrative Practice Section has been actively involved in the production of this manual, with many section members volunteering as authors and steering committee reviewers. At the section's request, this edition will be dedicated to the memory of Pat Dore, who was instrumental in the production of the last edition.

For information, or to volunteer for future projects, contact Ellen Sloyer, Assoc. Editor, CLE Publications, at (904) 561-5600.

Fine-Tuning Trial Practice Before DOAH—

Davis' "Unwritten Rules" on Style, Substance, Strategy, Words, Witnesses, and Wiggles

by Ella Jane P. Davis
Hearing Officer, Division of Administrative Hearings, Tallahassee

This article is written from the perspective of a sitting DOAH Hearing Officer (8 years) who came to the Division after 13 years of litigation experience. Mrs. Davis has recently been certified by the Florida Supreme Court as a county and circuit court mediator of state-wide jurisdiction pursuant to the educational, practical training, and good character requirements of Rule 1.760 Fla. R. Civ. P. *She writes this second in a series of three "practical advice" articles at the request of the Administrative Law Section Executive Committee.*

Approximately twenty years ago, when I was trying two criminal jury trials on some days and probably three a week during "terms of court,"[1] I had the youthful misapprehension that *style* was important in trial work, be it criminal or civil. The intervening years of civil and administrative practice have modified that view.

"Style is important" remains a truism in all types of jury work. Juries *love* a showman (or showwoman), but "style" or flamboyance achieves very little in bench trials. Since every formal hearing before the Division of Administrative Hearings (DOAH) is a bench trial of sorts, this article is written with the intention of helping advocates *smooth out* their performances at formal hearing and concentrate on substance over style in their interlocutory practice before DOAH. The emphasis herein is upon Section 120.57(l) *F.S.* cases. Hopefully, some information will be peripherally useful in Section 120.54 and 120.56 *F.S.* cases before DOAH and in interlocutory practice and bench trials in Article V courts.

Davis' FIRST "unwritten rule of practice" is: *"Never let style, ego, or arrogance interfere with fairly representing your client's interest."* Advocates who are also Florida attorneys are bound by the *Florida Bar Rules of Professional Conduct.* Attorneys admitted in Florida also would be well-advised to reread their oath of admission to the Bar, particularly the portion that provides:

> "I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law."

Before DOAH, all advocates, whether they are lawyers or not, are bound by Rules 28-5.1055, 28-5.1056, 22I-6.008 and 22I-6.009, *Florida Administrative Code.*

The SECOND "unwritten rule of practice" is: *"If morally in doubt about a course of action, don't do it."* Our parents taught us that precept. Our parents were right. Not yet codified at law, the precept recently has been memorialized in a book by Robert Fulghum entitled, *All I Really Need to Know I Learned in Kindergarten.*

The THIRD "unwritten rule" is, *"Make it easy for the judge."* The obvious corollary to that rule is, *"By making it easy for the judge, you make it easier for yourself, because you are more likely to get the close calls decided in your client's favor."* Paraphrased, the rule reads, *"Make it easy for the judge to rule with you."*

Several ways to "make it easy" were discussed in a prior article.[2] Among these are: Follow Rule 22I-6.020 *F.A.C.* by filing a Request for Official Recognition well in advance of formal hearing and attach copies of the statutes, rules, and cases to be recognized. Bring copies of necessary cases to formal hearing. Attach to your proposed recommended order (PRO) copies of the cases cited therein.

Another important tip as to interlocutory or discovery practice is: *Sign* every pleading and indicate the date and method of service on your signed certificate of service. This is not a facetious suggestion. Service of all pleadings upon all parties is required. However, many *pro se* litigants, lay-educated "qualified representatives,"[3] and even some

"just hatched" lawyers may not be aware that *service* of a pleading is not *presumed* by black letter law, by rule, or by case law unless it includes a signed certificate of service. The *Florida Rules of Civil Procedure* merely provide that a certificate of service signed by an attorney at law constitutes rebuttable *prima facie* proof of service.[4]

The Clerk of DOAH routinely mails "Initial Orders" over the signature of the Director explaining that service of all documents must be made on all parties and two copies of each document must be filed at DOAH. See also, Section 120.57(5) *F.S.* Yet, at least two or three times a year, every DOAH hearing officer (HO) is forced to puzzle through what to do about unsigned pleadings. For instance, without the *prima facie* proof provided by the signature of a party, a qualified representative, or an attorney on the certificate of service for a DOAH motion, an HO may have no obligation to enter any order. Under DOAH rules, all litigants have at least seven days in which to respond to motions.[5] If the HO does not have good reason to believe that the movant has served all the other parties, he may be unable to enter an order addressing the defective motion. The HO is not obligated to phone around to determine that the movant has, in fact, served the other parties.

Practitioners before DOAH should also be careful to comply with Rule 22I-6.016(2) *F.A.C.* when filing any pleading other than one directed to an initial petition. That rule requires that a movant "include a statement that the movant has conferred with all other parties of record and shall state as to each party whether the party has any objection to the motion."[6] If you have tried to reach the other side and cannot, state that in your motion. Every time an advocate fails to include a statement of the other parties' positions in his motion, he may be working against his client's interest because the absence of that information insures that the HO will either require a motion hearing or await the passage of the applicable response time instead of granting immediate relief. Movants should always serve everything on, and consult with, *all* participants in the case. Just because, in some types of cases, a Petitioner may be able to get into a "settlement mode" with the Respondent and that "settlement mode" has the potential of eventually dismissing the entire case, such a speculative outcome does not relieve the movant of the duty to serve all pleadings on all intervenors. Intervenors "take the case as they find it," but they are "in the case,"[7] nonetheless.

Likewise, responses to motions should be timely. If mailed, mailing of responses should take into consideration that although the U.S. Mail and DOAH's Clerk truly are NOT involved in a conspiracy to thwart practitioners' best efforts, "the best laid plans of mice and men oft go astray."[8] If a response is filed very close to the end of the period provided by the rule, it is probably worth the effort to append a note to the response asking DOAH's Clerk to immediately bring that response to the attention of the HO. Currently, there are a number of electronic computer functions within DOAH which can bring urgent matters to the attention of the correct HO faster than the physical processing of hard copy received from the U.S. Mail (or the hands of your office runner) through the Clerk's docketing process, and into the intended mailbox of individual (and sometimes incorrect) hearing officers. Skilled practitioners will not abuse this opportunity but will take advantage of it only when good practice demands it.

Like every other pleading, responses should be legal documents addressing real issues, *not* just diatribes against personality and methodology of the opposition. Unless your opponent's behavior has some legal or practical significance, using any pleading merely to harangue your opponent is not going to endear you to the HO and will only make future negotiations with your opponent more difficult, if not impossible.

Our parents correctly taught us that "words hurt." The current "politically correct" slogan is that "words are symbolic." More practically, "what goes around comes around." It is possible to be gracious without being a "wimp," and being gracious when you are certain of your legal position is usually more effective since motions, like cases, are decided on the merits. Remember, "Your client wants to *win* more than he wants anything else in the world, except that he does *not* want to be embarrassed or look foolish." Take heed, if not for your cli-

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ent's best interests, at least for your own. You may have to work with, or practice against, your opponent not just for the duration of a single case but for the rest of your legal career.

The legal profession, more than any other, should be aware of the difference between words used to be hurtful and words used symbolically, but from an HO's perspective, using words *accurately* is far more important. For example, the words "continuance" and "abeyance" are not words of art, but many people use them interchangeably and incorrectly. When they are used incorrectly or interchangeably in motions, it is difficult for the HO to enter an order granting the relief actually sought by the parties.

Motions to continue before DOAH are subject to a time frame unique to DOAH practice.[9] If granted, a continuance allows discovery to proceed. Only the hearing date is moved forward. It is good practice to indicate how long it will take the parties to prepare for formal hearing. It is also good practice for the movant to provide mutually agreeable dates when all parties will again be available for formal hearing. A movant cannot make such representations unless he has talked to the other side, but if he is abiding by Rule 22I-6.016(2) *F.A.C.,* he has conferred with the other side and can relate such information. If the movant thinks that all disputed issues of material fact will be resolved without formal hearing, he should also state that in his motion. Each of these pieces of information is helpful to the HO in deciding whether or not to grant the continuance and whether or not to reschedule the case immediately or give the parties plenty of time to work on settlement or discovery before rescheduling the case. Moreover, agreed motions for continuance are usually more readily granted than motions which are merely "unopposed." Motions that stipulate specific dates for rescheduling the formal hearing are also more readily granted and result in rescheduled hearing dates that are easier for attorneys and their clients to live with. Once again, the THIRD unwritten rule is: *"Make it easy far the judge to rule with you."*

If a movant genuinely believes the parties will settle all disputed issues of material fact very quickly or upon a date certain (an example being the day a settlement offer or consent order is scheduled for signature of the agency head or for presentation to a collegial board), then the parties should probably file a motion requesting an abeyance for a specified time. When courts were divided between "law" and "chancery," the word "abatement" had several meanings. For instance, at law, an "abated" action was utterly "dead." In chancery (equity) practice, the right of litigants to proceed was merely suspended by an "abatement." Only the last definition of "abatement" fits current useage before DOAH. If granted an abeyance before DOAH, consider the case "suspended" except for settlement negotiations. If an abeyance is granted, the court clock stops. The litigants, the lawyers, and DOAH save time, money, and effort. Discovery does not continue; motions will not be ruled upon. If discovery is outstanding, the time therefore is tolled during the abeyance. As another old saying goes, "Be careful what you pray for, because you may get it."

Which brings us to some real "words of art." The final paragraph of a motion wherein the practitioner sets out how he wants the HO's order to read is called the "prayer." This useage does not signify that the HO is a deity. The use of the word, "prayer," comes from the early Roman law courts by way of the European ecclesiastical courts of the Middle Ages. It means nothing more than "asks for." The words "requests" or "moves" are, to all intents and purposes, synonymous therewith. However, the more precisely movants "pray" for relief, the easier it is for an HO to draft the "decretal portion" of his or her order. The term, "decretal portion," comes from the days of English kings sitting in judgment and *decreeing* how a case was to be resolved. Today, the decretal portion of any order immediately follows the words, "It is ORDERED:". An HO is no king or deity, but practitioners are more likely to get what they want if they state it clearly and precisely in the motion's prayer, as in:

> "Wherefore, Petitioner prays/requests/moves that the hearing officer enter an order requiring the Respondent to provide *(specifically name what you sought on discovery)* to the Petitioner within *(number of)*

days of entry of the order granting this motion."

as opposed to the vague:

"Wherefore, Petitioner prays for the relief sought."

At the risk of being redundant, remember the THIRD unwritten rule: *"Make it easy for the judge to rule with you."*

Effective lawyers attain longevity, prestige, and competence because they understand that *substance* is more important at every level of a legal proceeding than is *e.g.*, but neither do they ignore *strategy*. "The new lawyer knows the rules; the experienced lawyer knows the exceptions." It is strategy which allows practitioners to manipulate substance to their clients' advantage. This topic also has been discussed in an earlier article.[10] Some ideas "culled" therefrom are: Focus on making a record for appeal. Do not belabor obvious legal points. Ignore personality in-fighting between citizens and agency personnel unless it has some identifiable legal significance. Stick to the material facts that make a difference to the outcome of your case. Concede or stipulate away time-consuming threshhold and jurisdictional issues and non-dispositive facts. Trial lawyers who fine-tune the foregoing concepts maximize their court performances.

Davis' FOURTH "unwritten rule" also has to do with maximizing lawyer performance. It provides, *"Trial lawyer performance is maximized by minimizing trial stress."*[11] Its corollary is, *"The more prepared you are, the better you will perform."*

Here are twenty more "tips" for practice before DOAH which are useful for trial preparation, and, hence, for stress reduction:

Tip 1. Make a good-faith effort in your response to DOAH's Initial Order by timely indicating where you want the final, formal hearing[12] and the dates the parties cannot be available. Also, state how long you need for preparation, even if it is in excess of the 120 days specified by the Initial Order. Indicate how long formal hearing will really take. Do not maximize your time estimate; do not minimize your time estimate. Play fair with your opponent. Give notice of related cases.[13]

Tip 2. On the day you receive the Notice of Formal Hearing, and, if applicable, the Order of Prehearing Instructions, list and calendar everything you have to do before the formal hearing date. On a "big" case, you will almost certainly change these lits/dates a dozen times, but if you start with a plan you will procrastinate less and accomplish more.

Tip 3. If, after you have made your initial trial preparation list you know you cannot timely prepare, immediately move for a continuance. Despite your fears that you will be considered a "flake," most HOs will not leap to that unfavorable conclusion unless you habitually make such motions. Most HOs will appreciate your candor because they will find it easier to change their dockets/calendars well in advance rather than at the last minute. Even if some imaginary judge somewhere thinks ill of your "style" on this, remind yourself that "style" does not matter, and your job is to protect your client's interests.

Tip 4. If applicable, start your prehearing order compliance early. File on time.

Tip 5. Have your witness subpoenas served well in advance of formal hearing. As "returns of service" come in, review them all against the instructions on the subpoena itself, Rule 22I-6.021 *F.A.C.*, Rule 1.410 *Fla. R. Civ. P.* and Chapter 48 *F.S.*, to be certain you will not be surprised at formal hearing by "insufficient service" problems. If you detect a problem with service of process early, you will still have time to correctly serve the appropriate person. Keep all "returns of service" available in a single file folder that you can take to formal hearing to establish that you did your job. Anticipate that you may need an emergency continuance before DOAH in order to get a circuit court order compelling a witness to appear at the formal administrative hearing, or you may want to request to substitute a deposition.

Tip 6. Telephone crucial witnesses in advance to go over their testimony, to explain courtroom decorum, and to tell them when you want them to appear. Keep telephone numbers and addresses for all witnesses on a single sheet of paper for the day of formal hearing. Anticipate that you will need to adjust scheduling of wit-

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nesses as the formal hearing unfolds.

Tip 7. A trial notebook is optional. Some lawyers swear by trial notebooks. Some prefer folders. Others have other methods. Trial notebooks seem to work best when one is trying a purely "paper case," but are hard to manage when one wants to use physical and demonstrative exhibits too. No practitioner should feel compelled to adopt anyone else's "style." Practitioners should use only methods that work for them individually, and they should feel free to adapt methods as their experience grows and depending on the type of case.

Tip 8. Do not speak to the trier of fact from a prepared "script," but have some type of memory jogger prepared FOR YOUR EYES ONLY. I call this "the brain sheet." Minimally, it should contain an outline of material issues, a list of the intended order in which you will call witnesses, a descriptive list of exhibits, and an intended order for presenting exhibits. Just knowing your "brain sheet" is there provides an emotional and psychological safety net when you draw the inevitable "blank" in a complicated presentation.

Tip 9: On the day of formal hearing, dress comfortably, but dress well. Take all items you will need. Practitioners represent clients even more "symbolically" than do the pleadings they file and the words they speak. "Lawyers should dress like lawyers,"[14] but remember, courtrooms are notoriously too hot or too cold and be prepared. You cannot try a case satisfactorily if you are shivering. Do not wear clothing that is likely to break or come apart. Mere apprehension that such a "blooper" could occur will distract you from the main business at hand—representing your client. Take a handkerchief. Foresee the possibility that you will have to call some witnesses to come in early or phone your office for support services, and take correct change for a pay phone. Take more pens, pencils, and legal pads than you could ever conceivably need. On this, "Murphy's corollary" is correct: "You will only need them if you do not take them."

Tip 10. If you can do so, walk around the courtroom early on the day of hearing before anyone else gets there, and stake out your territory your own way.[15] Be sure you have a clear line of sight to the witness chair, the court reporter, and the bench. If one of DOAH's courtrooms in Tallahassee or a circuit courtroom is used or if you are confident of how the HO will arrange the room for formal hearing, select your location, get settled, and place your materials where you can comfortably use them.

Tip 11. Greet your witnesses before the hearing starts. If you have any reason to believe they will have to wait outside the courtroom, find them as comfortable a place to wait as possible. Tell them where the restrooms and the water fountain are. Remind them to stay available. You know how uncomfortable you feel under courtroom stress. Imagine how uncomfortable *they* feel. It is a maxim of the profession that, "There are *no* HAPPY witnesses, but the HAPPIER you can make them, the more cooperative they will be."

Tip 12. Decide what you are going to call the trier of fact and stick to it. Whatever you chose, be consistent. It is appropriate to call a DOAH hearing officer, "Mr. Hearing Officer" or "Madame Hearing Officer," although most of my gender cringe at the latter form of address. The more modern form of address is simply "Mr. Jones" or Mrs. Davis." It is always appropriate to call an Article V judge "your honor," regardless of gender. In the Florida Panhandle and certain other parts of Florida, frequent useage seems to have rendered "Judge (last name)" a form of address which is acceptable to most Article V judges, although grammatically suspect. Most DOAH hearing officers are not offended by any of the foregoing forms of address, but I urge you to "lose" the terms, "Madame" because it is outmoded and stilted, "tribunal," because it means a three judge court and is inaccurate for DOAH, and "your worship." The last piece of nonsense is one of the few terms that has *not* been transferred into American forum from the English legal system.

Tip 13. PMPO.[16]

Tip 14. Once they take the stand, treat

every witness with courtesy, dignity, and humanity. Do not rely on sarcasm, badgering, or rudeness. These techniques backfire more often than they reveal or persuade. For instance, asking a school teacher if he can read when his testimony does not coincide with your interpretation of a document is in the worst possible taste. Aggressive attorneys "hoist the foe on his own pitard" by the use of tried and true trial techniques, but they do not turn into "The Terminator" to do it.[17] Do not call your client by his or her first name and all the other witnesses by the appellation "Mr." or "Mrs." Do not address witnesses by their first names unless you have their permission to do so. Be careful how you approach children as witnesses. Use your head in the type of crossexamination questions you ask to discredit the opposing party or his expert. There is no advantage gained in calling your client's consulting Ph.D. "Dr." and addressing your opponent's consulting Ph.D. as "Mr." or "Mrs." That type of "cheap shot" does not reduce the witness' stature; it reduces the credibility of the lawyer who uses it.

Tip 15. Come back from recesses on time.

Tip 16. Ask if you may submit closing argument by memorandum or within the conclusions of law portion of your PRO. Oral closing arguments, however innovative, forceful, and inspiring they may be, have less effect in bench trials than before lay juries and appellate courts. Transcripts which memorialize oral closing arguments may be helpful, but since HOs usually enter their recommended orders at least thirty days after they have heard oral closing arguments, it is simply common sense that an HO will retain more of what you want him or her to retain if your closing argument is in writing and is available when an HO is, preparing his or her own recommended order, and ruling upon your proposed findings of fact pursuant to Section 120.59(2) *F.S.*

Tip 17. Answer the HO's questions on time frames for transcript filing, if you elect to file a transcript, and on dates for filing proposed findings of fact and conclusions of law directly and with precision. Ask for the time you need; do not minimize; do not maximize. Play fair with your opponent.

Tip 18. List and calendar everything you still have to do immediately after leaving the formal hearing.

Tip 19. File your post-hearing materials timely and fairly. This covers after-filed exhibits as well as PROs. If, for instance, you have received permission to have an after-filed deposition considered, file the deposition transcript simultaneously with a "Notice of Filing." The Notice of Filing should describe what is being filed and clearly show that permission to file it was obtained on the record in open court. If the HO indicated on the record how the exhibit would be numbered, also indicate that exhibit number in your Notice of Filing. If physically practical, attach a copy of the exhibit to the copy of the Notice of Filing you serve on all other parties. File your PRO on time. Follow the form and page limitations set out in the rule[18] and/or post-hearing order, if applicable. Experienced administrative law practitioners have been known to peruse *Florida Administrative Law Reports* until they find a prior recommended order

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

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on similar issues by the HO assigned to their current case. This scrutiny serves several purposes. It is first and foremost "legal research" on the subject matter of the current case. It provides precedential case law. Also, for strategy and persuasion, there is nothing quite like citing an HO's own words back to him or her. Earlier cases may also indicate how your current HO reasons, writes, and the format he or she prefers you use for your PRO. The less there is for an HO to "tinker with," the more likely it is that he or she will accept your proposals as submitted. Remember the THIRD "unwritten rule?" *"Make it easy for the judge to rule with you."*

Tip 20. Read the recommended order as soon as you get it. If you feel the need, file a motion for a corrected order.[19] If appropriate, file exceptions with the correct agency, not DOAH. If you think settlement is still possible and worthwhile to avoid further litigation, pursue settlement. All three options can be pursued simultaneously, but watch your time limits carefully.

In the next and last installment in this series of practical tips, I hope to discuss evidentiary hearsay, mediation in administrative proceedings, and more on lawyer stress. In the meantime, if readers would like to submit further topics for my last article regarding trial practice before DOAH, I welcome suggestions.

The views expressed are purely those of the writer. The Division of Administrative Hearings does not have a Division view on this particular topic.

Footnotes

[1] Believe it or not, "criminal court" has not always run year 'round. Back then, circuit judges "sat" in different counties at different times of each year.

[2] Davis, Ella Jane P., "Tips on Practicing Before a Hearing Officer of DOAH or "Judgment Calls I Have Known and Loved'," *Administrative Law Section Newsletter*, Vol. XIII No. 4, (June 1992).

[3] See, Sections 120.53(l) (b), 120.54(10), 120.62(2), and 120.67 *F.S.* and Rules 28-5.1055 and 22I-6.008 *F.A.C.*

[4] See, Rule 1.080(f) *Fla.R.Civ.P.* See also Section 120.57(5) *F.S.*

[5] Rule 22I-6.016(1) *F.A.C.* provides for a "seven day response period, plus five for mailing."

[6] See also, Rule 22I-6.019 *F.A.C.*, which adopts the *Fla.R.Civ.P.* governing discovery.

[7] See, Rule 22I-6.010 *F.A.C.*

[8] Offered with apologies to the great Scottish poet, Robert Burns.

[9] Rule 22I-6.017 *F.A.C.* provides, among other matters, that requests for continuance must be made at lease 5 days in advance of formal hearing except for "extreme emergency" situations.

[10] Ibid. at n.2.

[11] Several recent articles in professional journals have named SEC practice, domestic relations, and any type of litigation as the three most stressful areas of law practice, which areas account for the highest numbers of attorneys experiencing "burn out" in the mid-thirties to age 50 range. Since I read approximately six journals at least sporadically, I cannot more accurately cite either the studies or the publications. Suffice to say, if you are suffering "burnout," you are not alone.

[12] See, Rule 22I-6.014 *F.A.C.*

[13] See, Rules 22I-6.005 and 22I-6.011 *F.A.C.*

[14] This maxim is so old it has whiskers. I first heard it from W. Dexter Douglass and John C. Cooper, Tallahassee attorneys.

[15] I once second-chaired a series of cases with a Rambotype lawyer who maintained a phenomenal "win" record. He operated on the "wiggle theory." Before every trial, he would go into the courtroom alone and select the best chair for himself by "wiggling" his posterior around in each chair at each counsel table until he, like the three bears in the story, was perfectly satisfied. Then, he would move the chair he had selected into the position designated for him. Sometimes, this meant that he selected a different chair on different days of the same trial. I could speculate that he was superstitious or that his posterior changed shape from day to day, but why he did this does not matter. The point is, he adapted the environment to his needs and minimized his stress while maximizing his trial performance for his client.

[16] This is my personal evidentiary lifeline for *"Present* the document to be marked; *mark* the document with an exhibit number; *present* the predicate; and *offer* the exhibit.

[17] Before this series ends, I will try to include a bibliography of trial practice books and Florida Bar CLE programs available on VHS tape or in book form that encourage aggressive direct and cross-examination techniques without devolving into unethical or abusive practice.

[18] See, Rule 22I-6.031 *F.A.C.*

[19] See, Rule 22I-6.032 *F.A.C.*

Administrative Law Legislative Update

by Robert L. Harris
Ackerman, Senterfitt, Eidson & Moffitt, Tallahassee

The 1992 Florida Legislature has made a number of changes to Chapter 120, the Administrative Procedures Act. During the various regular and special sessions the Legislature addressed the issues of indexing agency orders, economic impact statements, increased involvement of the Joint Administrative Procedures Committee in agency rulemaking, and additional restrictions on challenges by substantially affected parties to agency rules.

During the 1991 Fall Administrative Law Conference, a debate was being waged between agencies that felt hampered in the development and implementation of their policies and rules, and affected parties frustrated by ineffective mechanisms for challenges to those same policies and rules. In response to a number of changes made last year, in Chapter 91-30, Laws of Florida, the agencies, through the Lt. Governor's Office, bargained this year for less-restrictive legislation, while giving the Joint Administrative Procedures Committee (JAPC) more authority in reviewing and challenging agency decisions in the rule-making process. JAPC will now have greater ability to assure that agency rule-making is consistent both with legislative intent and procedural due process.

The primary legislative effort for this year has been enacted in Chapter 92-166 (Senate Bill 1354), which was effective July 1. This bill had a number of substantial provisions, including:

1. *Economic Impact Statements* will no longer have to be prepared by the agency unless the agency reasonably determines that the proposed action would result in a substantial increase in costs or prices paid by consumers, individual industries, or state or local government agencies, or would result in significant adverse effects on competition, employment, investment, productivity, or innovation. An agency decision to forego preparation of an economic impact statement cannot be challenged. Also, agencies no longer have to publish a summary of the estimate of the economic impact with the notice of intended action.

There are still certain circumstances under which an agency *must* prepare an economic impact statement, such as if a written request for an economic impact statement is filed with the agency by the Governor, a body corporate and politic, at least 100 people signing the request, an organization representing at least 100 persons, or any domestic nonprofit corporation or association. From this point, standing to challenge an economic impact statement will require that the challenging person had requested preparation of the economic impact statement, and had provided the agency, either at a workshop, public hearing, or through written comments, with information sufficient to address specific concerns regarding the economic impact of the proposed rule. The new law also includes a "harmless error" provision, which limits the grounds by which the rule may be invalidated with respect to an economic impact statement to only when the agency's failure in reviewing and considering the submitted information substantially impairs the fairness of the rule-making proceeding.

The law also expands the factors to be considered when an agency prepares the economic impact statement. In addition to the current cost to the agency in implementing the proposed rule, the economic impact statement must also include the cost to any other state or local government entities in implementing and enforcing the proposed rule, along with any anticipated effect on state or local revenues. The act also requires the economic impact statement to include a description of the probable costs and benefits of the proposed rule when compared to the probable costs and benefits of not adopting the rule. Finally, the economic impact statement must also include a determination as to whether less costly or less intrusive methods exist for achieving the purpose of the proposed rule, along with a statement as to why those alternatives were rejected in favor of the proposed rule.

The Legislature, through the new law, is trying to convince agencies that their rules need to consider and implement the alterna-

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tive that imposes the lowest net cost to society based upon consideration of the components required to be included in the economic impact statement, or to provide a statement specifying the reasons for rejecting that alternative in favor of the proposed rule.

2. *Agencies may now use an electronic data base* in lieu of subject matter indexes to be copied, for their orders, and such data base will be made available for public use, research and retrieval.

3. *Through Notice of Rule Development,* a new procedure, agencies will have the discretion to notice and hold public workshops *prior to providing notice of a proposed rule.* The purpose is to get the regulated community involved in the conceptual part of the rule-making process. Publication in the F.A.W., with some degree of detail, is required.

4. *The Joint Administrative Procedures Committee (JAPC)* will be able to exert more control over the rule-making process, including emergency rules, by seeking either administrative or judicial review of the validity of agency rules. Additional criteria was developed, including whether the rule is consistent with specific legislative intent and a reasonable implementation of the law as written. Agencies adopting emergency rules must be able to demonstrate a real emergency.

5. *Judicial review,* pursuant to section 120.68, is limited now to either review of orders following 120.54(4) or 120.56 proceedings, or when the sole issue is the constitutionality of a rule with no disputed facts.

6. *Agencies acting under federal law* are authorized to adopt federal regulations as their own. This new section, 120.543, has some restrictions on agency discretion but basically allows a state agency to adopt federal guidelines in their rule-making.

7. *The official reporters of the Public Employees Relations Commission* are deemed by law to fulfill the indexing requirement for orders contained in section 120.53.

Among the additional legislation of interest was the movement of the Division of Administrative Hearings (DOAH) from under the now-abolished Department of Administration, to the new Department of Management Services (formerly Department of General Services) (Ch. 92-279); the abolition of a number of public record exemptions both in the Department of Health and Rehabilitative Services (Ch. 92-58) and Division of Banking and Finance (Ch. 92-303); and, the extensive revisions to taxpayer contest proceedings (Ch. 92-315).

The Legislature is due to return following the November elections. More than likely there will be very few changes to the APA during this next session. The legislation implemented over the past two years will be given a chance to work before significant modifications will be considered.

Case Notes

by John Radey
Aurell, Radey, Hinkle, Thomas & Beranek, Tallahassee

DOAH hearings are not always *de novo.* In a bid dispute case involving a low bidder with a technically unresponsive bid, the court in *Intercontinental Properties. Inc. v. DHRS and Coliseum Lanes, Inc.,* 17 FLW D2030 (Fla. 3d DCA, September 1, 1992) interpreted *Liberty County v. Baxter's Asphalt & Concrete, Inc.,* 421 So.2d 505 (Fla. 1982), to allow an agency the discretion to waive technical defects in form where such defects do not confer an economic advantage on one bidder over another. The basic facts presented were that HRS solicited bids, proposed to award to the low bidder (Coliseum), the second low bidder (Intercontinental) requested a 120.57 hearing, DOAH entered its recommended order rejecting both bids, and HRS entered its final order adopting the recommended order. The court held that DOAH mistakenly thought it was acting in

a *de novo* capacity, and that DOAH was required to act "in a review capacity [to] determine whether the bid review criteria set forth in *Baxter's Asphalt* have been satisfied." As a result, the court, despite HRS's final order rejecting both bids, appeared willing to reverse the final order because of DOAH's mistaken approach to the case, but did not do so because the low bidder dropped out of the bidding during the appeal. The limited role of the hearing officer in a bid controversy is also described in *Procacci v. DHRS et al.*, 17 FLW D1859 (Fla. 1st DCA, August 3, 1992, Case No. 91-1643).

So, too, in *West Coast Regional Water Supply Authority v. Harris,* 17 FLW D2063 (Fla. 1st DCA, September 2,1992, Case No. 91-2148), the court held that the DOAH hearing officer could consider supplemental information regarding employment qualifications where, as emphasized by the court, such information was known by the employer *"during the hiring process."* The court interpreted *Harris v. PERC,* 568 So.2d 479 (Fla. 1st DCA 1990) to require that the DOAH hearing officer focus upon available information "during the hiring process," not all information relative to a good hiring decision.

The court in *The Caliente Partnership v. Johnston and DCA,* 17 FLW D1998 (Fla. 2d DCA, August 28, 1992, Case No. 92-02475), construed Section 163.3184(8)(b), Florida Statutes. That Section gives the DCA 45 days to issue notice challenging an amendment to a comprehensive plan as not being in compliance with the Growth Management Act. The court refused to issue a writ of prohibition because there was some factual dispute as to whether DCA acted within the 45-day window and because the court was unwilling to give the developer a default approval even if DCA acted outside the 45-day window. The court viewed the default approval as too harsh in view of the statutory objectives of wise planning and public input.

The tests for determining whether a statute is consistent with the equal protection clause "apply as well to rule challenges at the administrative trial level." *Florida League of Cities, Inc. et al. v. DER et al.,* 17 FLW D1966 (Fla. 1st PCA, August 18, 1992, Case No. 90-1733 and -1749; on reh. vacating original opinion). The *Florida League* decision involved challenges to a DER proposed rule and Justice Ervin affirmed the validity of the rule with a long discussion of federal cases construing the limits of the police power in the face of an equal protection challenge because the proposed rule "met the highly deferential reasonable basis standard."

In another rule challenge case, *Dravo Basic Materials Company, Inc. v. DOT,* 17 FLW D1673 (Fla. 2d DCA, July 8, 1992, Case No. 91-03012), the court was faced with a DOT rule placing different road aggregate requirements on three different categories of aggregate suppliers. Petitioner was the only supplier falling into one category and was disadvantaged by the DOT scheme of categorization. Without mentioning equal protection considerations, the court simply emphasized the presumptions running in favor of agency's rules and the failure of petitioner to carry its burden of showing the rule to be arbitrary or capricious.

A similar deferential standard was applied in *B & H Travel Corporation v. DCA and Town of Redington Beach* 17 FLW D1855 (Fla. 1st DCA, July 29, 1992, Case No. 91-522, where the town's comprehensive land use plan was found to be in compliance with the Local Government Comprehensive Planning and Land Development Regulation Act. Ignoring certain hypertechnical irregularities in procedure with reference to the penchant of local government to act informally, the court interpreted Section 163.3184(9) broadly in affirming the hearing officer and DCA's determination that the plan was in compliance given active participation by a planning board and "the public's unfettered and significant participation" in the local approval process.

The court was not very deferential to DPR in *Schram v. DPR,* 17 FLW D1871 (Fla. 1st DCA, August 7, 1992, Case No. 91-2091). In that case, pharmacist Schram had his license to practice revoked by DPR without Schram having been notified of the revocation proceeding. DPR had sent notice to Schram's last residence, but that notice was returned as undeliverable as addressed. DPR then published the notice of the revocation proceeding in *The Leon County News.* Despite a DPR rule that required Schram to keep his address up-to-date, the court

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held that DPR's final revocation order was vacated because it violated the due process rights of Schram under Section 120.63. The court noted that the particular facts in this case "did not show that personal service on Schram could not be made."

DPR was also reversed in *Brown v. DPR,* 17 FLW D1771 (Fla. 1st DCA, July 23, 1992, Case No. 91-1630). The court found that DPR in 1989 administrative litigation finally determined that certain activities of Brown were acts of friendship. Therefore, DPR was collaterally estopped to initiate new disciplinary administrative proceedings against Brown 10 days before the 1989 litigation ended with DPR's final order.

The court in *Arpayoglou v. DPR,* 17 FLW D1620 (Fla. 1st DCA, July 2,1992, Case No. 90-3072), partially reversed a final order of DPR that suspended Arpayoglou's license until he notified his patients of the relocation of his practice to Uruguay and fined him for failure to complete medical records and failure to inform the Board of Medicine of his change of address. The suspension of Arpayoglou's license was reversed because the complaint did not charge the doctor with failure to give notice of relocation to his patients.

The court affirmed summary judgement in favor of DOT by the circuit court in *Phillips & Jordan. Inc. v. DOT,* 17 FLW D1590 (Fla. 1st DCA, June 23, 1992, Case No. 91-1614). Plaintiff asserted a right to additional compensation under a DOT contract for clearing and fencing. While plaintiff's bid was on a unit price basis, including a per acre price for clearing, the court refused to extend the constructibility doctrine because there was no latent defect in the job specifications. In addition, the court refused the extra compensation for clearing because the contract expressly required a written reformation of the contract before such additional compensation would be paid.

MINUTES

Administrative Law Section

Executive Council Meeting

Friday, June 26, 1992
8:30 a.m.
Jade Suite 654, Orlando World Center
Orlando, Florida

I. Call to Order

The meeting was called to order by the Section Chair, Gary Stephens.

Members present: Gary Stephens, G. Steven Pfeiffer, Stephen T. Maher, Vivian F. Garfein, Linda M. Rigot, Ralf G. Brookes, Johnny C. Burris, William R. Dorsey, Mary F. Smallwood and Diane D. Tremor.

Members absent with excuse: William E. Williams, Betty J. Steffens and P. Michael Ruff.

Also Present: Tom Ervin, Board of Governor's Liaison, Bruce Fraser, Catherine Green, Robert Panoff, CLE Chair, and the Honorable James Wolf, Judge of the First District Court of Appeal.

The candidates for president-elect of The Florida Bar also visited with us. Each made a short presentation before leaving to attend other meetings.

II. Preliminary Matters

A. Consideration of the Minutes, May 22, 1992

The minutes of the May 22, 1992 meeting were approved.

B. The Treasurer's Report.

The Treasurer reported that the Section's fund balance currently stands at $45,791.00. The Chair suggested that consideration should be given to paying travel expenses for those officers and members of the executive council who fly to Tallahassee from other areas of the state to attend meetings. This would be more cost-effective than rotating the meeting to locations outside Tallahassee.

No vote was taken on that suggestion.

C. Visit by the Honorable James Wolf, Judge of the First District Court of Appeal.

Judge Wolf appeared at the meeting to brief the Section on the First District's plans to establish a mediation program that will focus in the areas of administrative law and worker's compensation. He noted that the court's caseload is 10% higher than projections and that there has been a 12–13% growth in administrative cases, and a 20-23% growth in worker's compensation cases.

The Court is considering applying for a grant to fund the mediation project that it is planning. The grant deadline is October 1, 1992. He invited members of the executive council and of this Section to communicate with the court concerning the issues the proposal raises, such as who should conduct the mediations, where they should be conducted, whether telephonic conferences should be used, and other matters. He indicated a draft proposal should be out in August and a final proposal should be ready by early next year. The Court is hoping to establish a three year program beginning July 1, 1993. He asked the section to provide comments to the Court by June 12, if possible.

The Honorable James Wolf's presentation concluded with a general discussion of the proposal.

III. Committee Reports

A. Long Range Planning Committee

Steve Pfeiffer indicated that, in an effort to avoid scheduling conflicts, he would circulate a schedule of future Section meetings. He also indicated that Peg Griffin, a former section coordinator for the section, was applying for a position being vacated by Lois Rice. He made a motion approved by acclamation, that the Section support her application because of the outstanding work that she did on behalf of the Section while she was the section coordinator.

B. CLE Committee–Bill Dorsey

Bill reported that the CLE Program held in Tallahassee on May, 1992–Administrative Law Update: The Latest Developments in Technology and Law, was very successful, both in terms of attendance and profit for the Section. Bill also indicated that in the CLE area, the question of co-sponsorship of programs is still being examined, as is the plan to try to make CLE outlines supplements to existing Bar materials. He also indicated that the best CLE speakers by section will be identified and their names will be published. He will work on identifying the best speakers in our Section.

C. Publications–Linda Rigot

Linda announced that Veronica Donnelly and Bill Hyde will coedit the newsletter. She also announced that Cathy Lannon was retiring from the Newsletter. It was proposed that an article from our newsletter be reprinted by another Section in order to encourage membership in the Administrative Law Section. A "helpful tips" type article was suggested as a perfect candidate for such a placement. It was suggested that perhaps the Environment and Land Use Law Section might be a good section to work with on this project. The group agreed to explore these opportunities.

D. Legislative Committee–Betty Steffens

Tom Ervin, the Board Liaison, reported on legislative developments and big issues this year on the Board of Governors. Bill Sizemore will be the new liaison from the Board, as Tom Ervin is retiring from the Board of Governors. The Council thanked Mr. Ervin for his many years of service as Board liaison. Betty Steffens was unable to attend but her report on legislative developments was similar to that delivered by Tom Ervin. Also, Gary spoke about some of the developments in Bar lobbying referred to by Tom Ervin. At that point, guest Bob Panoff, the outgoing CLE Chair, was introduced to say a few words. He stressed a need for input into the CLE process from the Sections.

Next, the Chair gave a report concerning the Council of Sections which met the day before. There was a proposal made to the Council of Sections that the sections contribute toward the computerization of the section liaisons. That motion had been defeated.

Gary also announced that a Section Leaders Conference was planned for July 10 and 11th. He also informed us that David Brennan had been elected Chair of the Counsel of Sections.

Gary then gave a report on the Task

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Forces that he set up earlier in the year. He indicated that Steve Pfeiffer would continue to support those task forces. Gary is in charge of the Mediation Task Force; Diane will lead the Local Government Task Force and Ralf will lead the Access Task Force, succeeding Dick Belz.

E. Pat Dore Memorial–Vivian Garfein

Vivian reviewed the options available to the Council to honor the memory of Professor Dore, including named chair on the FSU Law School, a Pat Dore scholarship fund, which could also be a fallback to the named chair if we were unable to raise the required $100,000 needed to endow a chair, a Pat Dore lecture series, or a Pat Dore headstart program for minority law students. Vivian indicated that the Council should chose from among these proposals. She recommended a $20,000 contribution from this section for start up and the authorization of $2-3,000 from this Section to aid in soliciting funds for the project. After discussion, the consensus of the group was to seek to establish a named chair for Professor Dore at the Florida State University Law School, which would be available only to a professor committed to teaching, research and writing in Florida Administrative Law. The Section also unanimously voted to change the name of the Administrative Law Conference to the Patricia Ann Dore Memorial Administrative Law Conference. Vivian indicated that she would be willing to head up the fundraising. A $23,000 budget amendment that was requested was unanimously approved.

F. Nominating Committee

Stephen Maher was nominated for Chair-Elect. Vivian Garfein was nominated for Secretary. Linda Rigot was nominated for Treasurer. Johnny Burris was nominated to fill Linda's spot on the Executive Council. The members of the Executive Council whose terms were expiring in 1992 were renominated for terms expiring in 1994. There was a recommendation made to amend the by-laws to expand the Executive Council from 10 to 12 members, adding a member of the Executive Council in 1993 and 1994. That recommendation was approved, but must be approved by the Board of Governors before those positions can be filled. Carol Forthman and Cathy Castor were suggested as persons who should be elected to fill those new positions when they are approved.

The Council approved the Nominating Committee's report.

The Meeting of the Executive Council was then adjourned. The Annual Meeting of the Section was then called to order. An election was then held.

IV. Elections

Stephen Maher was elected Chair-Elect. Vivian Garfein was elected Secretary. Linda Rigot was elected Treasurer. Johnny Burris was then elected to fill Linda's seat on the Executive Council, Ralf Brookes, Bill Dorsey, Cathy Lannon, Michael Ruff and Mary Smallwood were all elected to fill terms on the Council expiring in 1994. A motion to amend the by-laws was made to add two (2) seats to the Executive Council in both 1993 and 1994. The amendment was amended to add four (4) seats to the Executive Council. Carol Forthman and Cathy Castor were elected to fill two of those seats, when a request to expand the Council is approved by the Board of Governors. Names for two others seats will be submitted to the Nominating Committee.

V. Awards

Awards were given to Betty Steffens for her work at the Chair of the Legislation Committee; to Bill Williams, Chair of the Administrative Law Conference; to Bill Dorsey, Chair of the CLE; to Cathy Lannon for general good deeds, and to Linda Rigot for her work as Chair of the Publications Committee.

Gary then made concluding remarks suggesting that the Section do more of its work in committee. He also indicated that as immediate past Chair, he will continue to be involved in the work of the Section.

Chair Steve Pfeiffer then gave Gary Stephens a plaque honoring him for his work with the section. He pointed out Gary's work to improve the Section's relationship with the Bar and Gary's work with the Task Forces as his major contributions to the sec-

tion over the past year. He also indicated he has appointed Gary Bar Liaison for next year. Steve then discussed his agenda for the coming year. He indicated that fun was high on his agenda and that he was looking forward to the next administrative law conference, which is scheduled to occur in April and will then be chaired by Bill Williams. He indicated that he has appointed Bill Dorsey as CLE Chair for another year, and he is looking for a volunteer to chair the Membership Committee. Linda will continue to serve as Publications Chair. Vivian will lead the Pat Dore professorship fundraising effort. He indicated that his focus during the coming year would be to lead the reexamination of the Model Rules of Procedure. He indicated that, in his view, the rules should be re-examined to see how uniformity in administrative practice can be further reinforced. He will be working with the Administration Commission and the Governor's office on this effort and will chair this project for the Section.

Thereupon the meeting was concluded.

These minutes were approved at the September 18 Executive Council meeting.

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

Practicing before the Division of Administrative Hearings

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

October 16, 1992-November 6, 1992

Three Locations
Tampa (live) Ft. Lauderdale (video presentation)
Tallahassee (video presentation)

LECTURE PROGRAM

8:00 a.m.-8:25 a.m.
Late Registration

8:25 a.m.-8:30 a.m.
Opening Remarks
TBA

8:30 a.m.-9:20 a.m.
A Practical Guide to Constitutional Constraints on the Administrative Process
Johnny C. Burris Ft. Lauderdale

9:20 a.m.-10:10 a.m.
Bid Protests: An Agency Perspective
Susan B. Kirkland, Tallahassee

10:10 a.m.-10:20 a.m.
Coffee Break

10:20 a.m.-11:10 a.m.
After the Hearing: Persuading and Preserving in the Recommended Order
John D. Newton, II, Tallahassee

11:10 a.m.-Noon
1992 Administrative Law Case Update
Mary F. Smallwood, Tallahassee
Larry E. Sellers, Jr., Tallahassee

Noon-12:50 p.m.
Fees, Costs and the APA
Robert T. Benton, II, Tallahassee

Course No. 7114R

— REMEMBER YOUR EDUCATION REQUIREMENT —

DESIGNATION PROGRAM

(Maximum: 5.0 hours)

Administrative and Governmental Law .... 5.0 hours
Appellate Practice ..... 2.5 hours
Environmental Law ..... 5.0 hours
General Practice ..... 5.0 hours

CLER PROGRAM

(Maximum: 5.0 hours)

General: 5.0 hours
Ethics: 0.0 hour

CERTIFICATION PROGRAM

(Maximum: 3.5 hours)

Civil Trial ..... 3.5 hours

Credit may be applied to more than one of the programs above. Please keep record of credit hours earned. SEE BAR *NEWS* LABEL FOR CLER REPORTING DATE. TO AVOID SUSPENSION, RETURN YOUR COMPLETED CLER AFFIDAVIT PRIOR TO THAT DATE (Rule Regulating The Florida Bar 6-10.5).

ADMINISTRATIVE LAW SECTION

G. Steven Pfeiffer, Tallahassee — Chair
Stephen T. Maher, Coral Gables — Chair-elect
William R. Dorsey, Jr., Tallahassee — CLE Chair

FACULTY & STEERING COMMITTEE

William R. Dorsey, Jr., Tallahassee — Program Chair
Robert T. Benton, II, Tallahassee
Johnny C. Burris, Ft. Lauderdale
Susan B. Kirkland, Tallahassee
John D. Newton, II, Tallahassee
Larry E. Sellers, Jr., Tallahassee
Mary F. Smallwood, Tallahassee

CLE COMMITTEE

John-Edward Alley, Chair
Michael A. Tartaglia, Director, Programs Division

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Registrants unable to attend the seminar may request a refund, in writing. A $10 cancellation fee will be retained. Refund requests must be postmarked within 48 hours after the last course presentation. No refunds will be given after that time. Registration fees are not transferable to other CLE programs.

Register me for "Practicing Before the Division of Administrative Hearing" Seminar

TO REGISTER OR ORDER TAPES/MATERIALS, MAIL THIS FORM (OR A COPY) 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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Above your name on the *News* label

Address _____

City/State/Zip _____ **GS:C7114**

( ) Member of the Administrative Law Section of The Florida Bar: $75

( ) Member of The Florida Bar but not of the Administrative Law Section Section; not a member of The Florida Bar, or applicant for The Florida Bar exam: $85

( ) Full-time member of a law college faculty or a full-time law student working toward a Juris Doctor degree: $42.50

( ) Enclosed is my (separate) check in the amount of $20 to join the Administrative Law Section. Membership expires June 30, 1993.

NONSECTION MEMBER SURCHARGE REVERTS TO COSPONSORING SECTION.

I plan to attend (check one):

_____ (173) **Tampa** (Ramada Airport)** (10/16/92)
_____ (227) **Ft. Lauderdale** (Sheraton Suites Plantation)* (10/30/92)
_____ (54) **Tallahassee** (The Florida Bar)* (11/06/92)

*Videotaped Presentation **Videotaping Session ***Live

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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 or audio/video tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

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