ADMINISTRATIVE LAW SECTION

Newsletter

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The Importance of Always Being Nice As it Relates to Professionalism

by Richard J. Shoop

Section 1 of The Florida Bar's Professionalism Expectations reminds attorneys that "[a] license to practice law is a privilege that gives the lawyer a special position of trust, power, and influence in our society. This privilege requires a lawyer to use that position to promote the public good and to foster the reputation of the legal profession while protecting our system of equal justice under the law." In other words, attorneys must always be professional. Professionalism is no longer an aspirational goal for attorneys in Florida. It is now the standard.[1] But what does it mean to be professional? As a good friend and mentor told me, being professional means always being nice to everyone, regardless of how they act toward you. Why? Because you never know who you might be dealing with, or who might be watching you. In this article, I will give you a personal example of how being nice has benefitted me in my career, an example of the consequences of not being nice, and an example of how being nice is especially important when it comes to email communications.

The Benefit of Always Being Nice

There is an inherent value in always being nice, though it is not

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From the Chair

by Jowanna N. Oates

In my last column, I extended an invitation to you to attend the 2016 Pat Dore Administrative Law Conference. To my delight, many of you accepted the invitation and the sold-out conference was a resounding success. Judge Cathy Sellers and Patty Nelson, the conference chairs, and the members of the steering committee, Marc Ito, Jamie Jackson, Dan Nordby, Colin Roopnarine, Amy Schrader, and Richard Shoop, deserve kudos for organizing the event. Also, many thanks to Bruce Lamb, the Section's CLE chair, and Calbrail Banner, our Section administrator, for their invaluable assistance. The conference was full of interactive, informative, and engaging presentations. One of the highlights of the conference was "APA Jeopardy." I would like to extend congratulations to the winning team of Marisa Button, Paul Drake, and Judge John Van Laningham. If you were unable to attend the Pat Dore Conference, please consider purchasing the CD.

Since my last column, the Section has been busy with various projects. September 17, 2016, was the Section's second annual "Day of Service." For the second year in a row, the executive council volunteered at America's Second Harvest of the Big Bend. Second Harvest feeds the hungry in 11 counties in the Tallahassee area. One of Second's Harvest's specialized programs is the backpack program, which gives children backpacks filled with food each Friday to

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ensure that they have sufficient food over the week. Each week, approximately 700 children receive these food backpacks. To learn more about Second Harvest, volunteer, or donate, please visit their website at www.fightinghunger.org. I would like to thank Richard Shoop, Fred Springer, and Judge Gar Chisenhall for giving up part of their football Saturday to assist in filling backpacks.

On October 28, 2016, the public utilities law committee, headed up by Michael Cooke and Cindy Miller, put together an excellent CLE program on solar energy and renewables in Gainesville, Florida. Please stay tuned for the Section's spring CLE offerings. Please contact Bruce Lamb if you are interested in serving as a program chair or steering committee member. If you have never attended a live CLE, please try to do so this year. In this day and age, with the advent of technology, attendance at live CLEs has declined. However, there is no substitute for the interaction and networking with fellow practitioners that occurs at live courses.

The law school outreach committee, chaired by Judge Lynne Quimby-Pennock and co-chaired by Sharlee Edwards and Vilma Martinez, has put together wonderful panel discussions at the University of Florida Levin College of Law, Thomas M. Cooley School of Law, and Barry University School of Law. I would like to thank all of the volunteers who took time of out of their busy schedules to share their insights about the practice of administrative law with the students. The law school outreach committee is in the process of scheduling events at the University of Miami School of Law, Ave Maria School of Law, Florida Coastal School of Law, and St. Thomas University School of Law. Please contact Judge Quimby-Pennock if you are interested in participating in a panel discussion at a law school in your area; it will only take one hour of your time.

The ad hoc strategic plan committee, chaired by Judge Chisenhall and comprised of Francine Ffolkes, Brent McNeal, Patty Nelson, Christina Shideler, Amy Schrader, and Richard Shoop, worked for six months to develop a plan that will guide the Section's activities for the next few years. It is my hope that the implementation of this plan will help the Section retain, reclaim, and recruit new members. The Section cannot accomplish its goals and provide new services without maintaining a robust membership. The strategic plan was adopted by the executive council at its October 6, 2016, meeting. I encourage everyone to review the plan which may be found on the Section's website at http://www.flaadminlaw.org/.

As we enter a new year, I am hopeful that the Section will continue to grow and provide quality products and services to our membership. I encourage everyone to get involved this year. This is YOUR section. If you are unsure about how to get involved, please free to contact me.

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

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APPELLATE CASE NOTES

by Tara Price, Gigi Rollini, and Larry Sellers

Agencies—Sovereign Immunity Bars Claims of "Interference with an Ombudsman"
Department of Elder Affairs v. Caldwell, 199 So. 3d 1107 (Fla. 1st DCA 2016).

The Department of Elder Affairs (DOEA) appealed the trial court's denial of its motion for judgment on the pleadings after the trial court ruled that the Department was not entitled to sovereign immunity on Clare Caldwell's claim that DOEA was liable for damages under section 400.0083(3)(a), Florida Statutes.

Ms. Caldwell worked for DOEA as the south regional ombudsman from March 2003 until she was terminated in September 2011. While Ms. Caldwell was employed, the United States Agency on Aging (AOA) investigated DOEA and its treatment of the statewide ombudsman program. Ms. Caldwell took several actions while employed to assist AOA with its investigation. After AOA released its report, DOEA terminated Ms. Caldwell. Ms. Caldwell filed a complaint against DOEA for damages and equitable relief under section 400.0083(3)(a).

DOEA filed a motion for judgment on the pleadings, arguing that Ms. Caldwell's claim was barred because DOEA was entitled to sovereign immunity. The trial court held a hearing and denied DOEA's motion, ruling that sovereign immunity did not bar claims under section 400.0060, et seq., Florida Statutes, against DOEA. DOEA appealed.

The court noted that executive agencies in the State of Florida have sovereign immunity from claims arising under Florida law or common law, unless the Legislature has enacted a "clear, specific, and unequivocal waiver." In reviewing the statutes governing the ombudsman program for long-term care facilities, the court observed that section 400.0083 made it unlawful for "any person" or "other entity" to willfully interfere with the ombudsman program, but the terms "any person" and "other entity" were not defined in the statutes to include the state or its executive agencies. The court concluded that the Legislature did not intend to waive sovereign immunity for suits against the State under section 400.0083. Even if one could infer that the Legislature intended to permit suits against the State under that section, the court observed that "inference is not sufficient to constitute a clear and unequivocal waiver of sovereign immunity." Finally, the waiver of sovereign immunity under section 768.28(5), Florida Statutes, was inapplicable because that provision waives sovereign immunity for only tort claims, and Ms. Caldwell had brought statutory claims of retaliatory discharge against DOEA. The court reversed the trial court's order with directions to dismiss the case.

Bid Protest—FHFC Properly Rejected Application as Incomplete
Flagship Manor LLC v. Florida Housing Finance Corp., 199 So. 3d 1090 (Fla. 1st DCA 2016).

The state apartment incentive loan program (SAIL) provides low-interest loans to affordable housing developers that construct or rehabilitate housing for low-income Floridians. The Florida Housing Finance Corporation (FHFC) issued a Request for Applications (RFA) in January 2015. As a part of the RFA, applicants were required to provide information about the properties they proposed to develop and to show they had control over the properties. Flagship Manor LLC (Flagship) applied for SAIL funds, and as a part of its application, described a property and stated that the property would be "more particularly described at Exhibit A attached." Flagship's reference to an Exhibit A was a mistake; Exhibit was not included in the application. When FHFC reviewed the applications, it did not realize that Flagship's reference to Exhibit A was a mistake. Thus, when FHFC could not find Exhibit A, it rejected Flagship's application as incomplete and nonresponsive to the RFA.

Flagship timely protested FHFC's decision to reject its application. A hearing officer held an informal hearing and issued a Recommended Order stating that FHFC should affirm the decision to reject Flagship's application. The hearing officer concluded that the missing exhibit was not a "minor irregularity" under rule 67-60.0002(6), Florida Administrative Code, because "it was impossible to know the nature of the irregularity in the context of a missing and substantively unknown 'more particular' legal description." FHFC entered a Final Order adopting the hearing officer's Recommended Order. Flagship appealed.

The court stated that its standard of review was whether FHFC "erroneously interpreted the law and a correct interpretation compels a different result." The court held that FHFC's rejection of Flagship's application was not clearly erroneous. FHFC rejected Flagship's application based on rule 67-60.006(1), Florida Administrative Code, which states that "[t]he failure of an Applicant to supply required information in connection with any competitive solicitation . . . shall be grounds for a determination of nonresponsiveness." A determination of nonresponsiveness would require FHFC to reject the application under the rule. Flagship was required to provide a complete application, and it was not possible for FHFC to evaluate the importance of Flagship's omission of Exhibit A. Even if Flagship had provided sufficient information without the missing Exhibit A to

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evaluate its application, FHFC had to reasonably assume that the missing Exhibit A could have altered how FHFC evaluated and scored Flagship's application. The court noted that FHFC had previously rejected other applications with missing or incomplete exhibits in other cases involving competitive bids. Finally, because Flagship's mistake was not "clearly evident" from the face of its application, FHFC "could not look at the balance of Flagship's application" and determine that Exhibit A did not "exist or was immaterial."

Emergency Suspension Orders—Facial Requirements
Webber v. Department of Business & Professional Regulation, 198 So. 3d 922 (Fla. 1st DCA 2016).

Zane Paul Webber filed an "Expedited Petition for Review of Order of Emergency Suspension of License, and Request for Attorney's Fees and Costs," in response to an emergency suspension order issued by the Department of Business and Professional Regulation (DBPR).

Because there was no hearing below, the court evaluated only the face of DBPR's Order of Emergency Suspension. The court found the statements made in the order to justify the emergency suspension of Webber's license to practice as a CPA wholly insufficient to establish that his actions posed an "immediate serious danger to the public health, safety, or welfare" as required by section 120.60(6), Florida Statutes.

Specifically, the court concluded that DBPR's order lacked any "particularized" allegations of fact demonstrating an immediate danger of continuing harm, noting it is not enough for an emergency suspension order merely to allege statutory violations. Instead, the allegations of continuing harm must be "particularized," not "general and conclusory" or related to stale actions. The court also found that the order was not "narrowly tailored to be fair," and that DBPR failed to convincingly show why less restrictive alternatives short of emergency suspension of the license were not utilized.

Thus, "to the extent the Order of Emergency Suspension failed to demonstrate on its face an immediate and recurring threat to the public," and because license suspension was not a "narrowly tailored remedy," the court concluded the action taken by DBPR failed to afford Webber "the due process protection that our state and federal constitutions demand." Consequently, the court quashed the Order of Emergency Suspension of License.

However, the court denied Webber's request for attorney's fees and costs on the basis that Webber failed to make the request by separate motion, citing Florida Rule of Appellate Procedure 9.400(b)(2).

Licensure—Emergency Restriction of License
Osakatukei O. Omulepu, M.D. v. Department of Health, 198 So. 3d 1046 (Fla. 1st DCA 2016).

Osakatukei O. Omulepu, M.D., petitioned for review of an Order of Emergency Restriction of License (ERO) issued by the Department of Health (DOH) prohibiting him from performing liposuction or any other procedure using the tumescent technique. Dr. Omulepu argued that the ERO was facially insufficient to justify the emergency restriction on his license because the ERO did not adequately allege that the complained of conduct was likely to continue. The court agreed, and quashed the ERO.

The court explained that an administrative agency is authorized to issue an emergency order restricting a license if the agency finds that "the immediate serious danger to the public health, safety, or welfare" requires such action. Additionally, the factual allegations of an emergency order must "demonstrate that (1) the complained of conduct is likely to continue; (2) the order is necessary to stop the emergency; and (3) the order is sufficiently narrowly tailored to be fair." An appellate court's review "of an emergency order is limited to examining the face of the order to determine if the elements were alleged with sufficient detail."

While allegations of past conduct resulting in harm can support an emergency order suspending or restricting a license, the harm must be sufficiently egregious and of a nature likely to be repeated. Moreover, where the past conduct significantly pre-dates the emergency order and there is nothing else in the licensee's history that would support an inference of continuing bad conduct, allegations of past harm, alone, are insufficient to support the emergency suspension or restriction of a license.

DOH alleged in the ERO that Dr. Omulepu committed medical malpractice in May 2015; however, the ERO was not issued until February 2016. Although there was no argument about the seriousness of the harm allegedly suffered by the patients listed in the ERO, the court found that DOH "failed to sufficiently allege that Dr. Omulepu's conduct that allegedly caused that harm is of a nature that is likely to continue."

Public Records—Attorney's Fees/Costs—Mootness
Cookston v. Office of the Public Defender, 41 Fla. L. Weekly D1634 (Fla. 5th DCA July 15, 2016).

Timothy Cookston appealed a trial court order denying his petition for writ of mandamus as moot. The petition sought to compel production of e-mails and other correspondence from the Office of the Public Defender and one of its attorneys (OPD) pursuant to the Public Records Act. The petition also included a request to be reimbursed for his costs, pursuant to section 119.12, Florida Statutes. The trial court found the petition moot because OPD provided the requested documents to Mr. Cookston after he filed his petition.

On appeal, the court explained that "[a]n issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect," the case "presents no actual controversy," or "when the issues have ceased to exist."

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Mootness does not destroy a court's jurisdiction, however, when collateral legal consequences that affect the rights of a party flow from the issue to be determined. Here, there remained an issue of the collateral legal consequences flowing from the underlying public records case, *i.e.*, Mr. Cookston's alleged right to be reimbursed for the costs of postage, envelopes, and copying documents.

The court concluded, in accordance with prior case law, that although the production sought by the petition was moot, it did not render moot his request for costs under section 119.12, Florida Statutes. Section 119.12 provides that if a plaintiff files an action to enforce the provisions of chapter 119 and "the court determines that [the] agency unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award . . . the reasonable costs of enforcement[.]" Accordingly, the case was remanded for further proceedings to determine whether the delay in producing the requested records constituted an unlawful refusal under section 119.12. The court also clarified that if the trial court were to conclude that the delay violated the Public Records Act, an award to Mr. Cookston for the reasonable costs incurred in enforcing access to public records is mandatory.

Public Records—Redaction Requirements
Jones v. Miami Herald Media Co., 198 So. 3d 1143 (Fla. 1st DCA 2016).

The Department of Corrections (DOC) provided heavily redacted records to appellees in response to a public records request. Section 119.07(1)(d), Florida Statutes, provides that "[a] person who has custody of a public record who asserts that an exemption applies to a part of such record shall redact that portion of the record to which an exemption has been asserted and validly applies, and such person shall produce the remainder of such record for inspection and copying." With the redacted records, DOC provided a standard form (that has been adopted by rule) containing checkboxes identifying the various statutory exemptions relied upon to redact the records. The form did not identify the specific exemption that applied to each redaction. Subsequently, appellees filed a complaint for injunctive and mandamus relief pursuant to chapter 119 to compel DOC to provide the specific exemption for each redaction. The trial court held a hearing, and ultimately ordered DOC to identify the specific statutory exemption claimed for each redaction.

On appeal, DOC argued that the Public Records Act does not require agencies to identify the statutory exemption relied upon for each redaction. The court agreed and reversed, observing that while "[t]he Public Records Act is to be construed liberally in favor of Florida's policy of open government …. this general principle of statutory construction does not give the courts free rein to engraft their policy judgments into the Act, nor does it authorize the courts to expand the requirements of the Act beyond its plain language."

Statutory Construction—Evidentiary Support for Eligibility Determination
M.T. v. Agency for Persons with Disabilities, 41 Fla. L. Weekly D1956 (Fla. 3d DCA Aug. 24, 2016).

M.T., is an individual diagnosed with Lennox-Gastaut syndrome and seizures. M.T.'s mother applied to the Agency for Persons with Disabilities (APD) for enrollment in the Home and Community-Based Services Medicaid Waiver Program (HCBS Waiver) due to M.T.'s "intellectual disability" under section 393.063(21), Florida Statutes. APD denied the application, on the basis that M.T. did not have an intellectual disability as defined by section 393.063(21). A hearing officer affirmed APD's determination of ineligibility in a Final Order.

The court reversed, concluding that APD misinterpreted the definition of "intellectual disability" and the evidence it requires to grant an HCBS Waiver application. The court explained that the Legislature did not impose a requirement that an applicant for the HCBS Waiver Program provide an IQ test administered before the applicant turned 18, only that the evidence show the requisite IQ and deficits manifested prior to the age of 18, and were reasonably expected to continue indefinitely. The case was remanded with directions that APD grant M.T.'s application for benefits under the HCBS Waiver.

Student Government—Subject Matter Jurisdiction Requirements in State Court
Florida A&M University Board of Trustees v. Bruno, 198 So. 3d 1040 (Fla. 1st DCA 2016).

Justin Bruno ran for student body president in February 2016 against Victor Chrispin. After Mr. Bruno was declared the winner of the election, Mr. Chrispin filed an appeal with the Student Supreme Court. At a pretrial hearing, the Student Electoral Commissioner, who had responsibility for the elections process, admitted that the student body statutes involving election procedures were not followed at the law school. The Student Supreme Court ruled that the entire election was invalid based on the Electoral Commissioner's admission and ordered a new election both at the main campus in Tallahassee and at the law school campus in Orlando.

Mr. Bruno appealed the Student Supreme Court's decision to the Florida A&M University (University) Vice President of Student Affairs and President. Both University officials affirmed the Student Supreme Court's decision. Mr. Bruno then filed a complaint for emergency injunctive relief in circuit court. The University's Board of Trustees (Board) moved to dismiss under section 1004.26(5), Florida Statutes, arguing that "no cause of action against a state university for the actions or decisions of the student government" shall lie "unless the action or decision is made final by the state university and constitutes a violation of state or federal law." The trial court denied the Board's motion

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to dismiss and after an evidentiary hearing, granted Mr. Bruno's injunction. The trial court enjoined a university-wide election but permitted the University to hold a new election at the law school campus.

The Board appealed, raising several issues, but the court addressed only the Board's argument that the trial court lacked subject matter jurisdiction under section 1004.26(5). The court held that section 1004.26(5) governed the dispute because Mr. Bruno's complaint involved the Student Supreme Court's decision, not an action of the University's administration. As such, the trial court could issue a ruling only if Mr. Bruno's complaint met the requirements of section 1004.26(5): (1) the university must have made "final" the challenged student government decision; and (2) the student government decision must have violated state or federal law. The court noted that Mr. Bruno's complaint alleged that the Student Supreme Court's decision was made final by the University administration. But Mr. Bruno had failed to allege that the Student Supreme Court decision violated any state or federal laws.

The court concluded that even if the Student Supreme Court had made procedural errors, those errors were not due process violations because "student government is an extracurricular activity — and it is well-settled that students have no constitutionally protected right to participate in extracurricular activities." The court suggested that it agreed with the trial court on the merits but was unable to consider the merits because the trial court lacked subject matter jurisdiction under section 1004.26(5). Thus, the court reversed the injunction and remanded the case to the trial court for an order dismissing the case.

Takings Claims—Ripeness of Permit Denials
Department of Environmental Protection v. Beach Group Investments, LLC, 41 Fla. L. Weekly D1795 (Fla. 4th DCA Aug. 3, 2016).

Beach Group Investments, LLC (Beach Group) purchased a coastal property in Fort Pierce on which it sought to build a luxury 17-unit townhome project. Beach Group needed to obtain a coastal construction control lines (CCCL) permit, pursuant to section 161.053(5)(b), Florida Statutes, from the Department of Environmental Protection (DEP) to ensure that Beach Group's proposed construction project was landward of DEP's 30-year erosion projection line. The method for calculating the 30-year erosion projection line is complicated and set forth in DEP's rules. When Beach Group purchased the land, DEP used a rule developed in 1997. DEP amended its rule after Beach Group purchased the property, and the new rule "left less land available for development." Under the old rule, Beach Group likely would have received a permit. Under the new rule, Beach Group was not eligible for a permit because its proposed project was seaward of the new 30-year erosion projection line.

In the months leading up to Beach Group's application, several DEP employees had provided assurances to Beach Group and its agents that the 1997 rule was still valid. After the application, however, DEP ultimately denied Beach Group's permit application based on the new rule. Beach Group believed it was futile to submit a request for a variance from DEP, based on its conversations with DEP employees.

Beach Group sought administrative review. Following the hearing, the ALJ issued a Recommended Order that recommended denial of Beach Group's application because the project extended seaward of the 30-year erosion projection line. The ALJ also stated that continued beach renourishment might be an appropriate consideration for any variance or waiver, which needed to be pursued in a separate proceeding. DEP entered a Final Order adopting the ALJ's recommended 30-year erosion projection line and denied Beach Group's application. The Final Order also stated that the "denial should not be construed as a statement of denial of any development potential for the subject parcel" and included the ALJ's recommendation to pursue a variance.

Beach Group did not pursue a variance and subsequently filed an as-applied regulatory takings action against DEP. DEP filed motions for dismissal and summary judgment, for lack of ripeness, which the trial court denied. Ultimately, the trial court ruled that DEP had committed a regulatory as-applied taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Moreover, the trial court concluded that any request for a variance would not have been granted. After a jury trial was held on damages, DEP appealed the trial court's judgment.

DEP raised two arguments: (1) Beach Group's takings claim was not ripe because Beach Group did not request a variance and failed to pursue other reasonable avenues to develop its property; and (2) the trial court's ruling that DEP committed a regulatory as-applied taking under *Penn Central* was erroneous. The court addressed only the ripeness claim and held that Beach Group's claim was not ripe for two reasons. First, Beach Group's claim was not ripe because it failed to request a variance. The court noted that unless the pursuit of a variance is futile, the permit applicant has the obligation to pursue administrative remedies, which include seeking a variance. Here, DEP had the authority to grant a variance from the rule, which governed how DEP's 30-year erosion projection line was calculated. The court noted that DEP, by "incorporating the ALJ's separate Recommended Order, . . . invited a variance application and even went so far as suggesting a justification for one." The court concluded that DEP "provided Beach Group with the opportunity to apply for a variance," but "Beach Group did not seize that opportunity . . . ."

Second, the court held that the evidence showed that Beach Group could have developed alternative plans for its property and did not propose any alternative plans to DEP.

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The court stated that a taking does not occur simply due to the denial of a permit that prevents a property owner from using his or her property in the most preferable or profitable way. Because Beach Group did not apply for a variance from the rule, nor develop and propose alternative plans to DEP, its takings claim was not ripe, and the court reversed and remanded the trial court's order for further proceedings.

Validity of FDLE Rules—Blood Alcohol Collection and Testing

Goodman v. Florida Department of Law Enforcement, 41 Fla. L. Weekly D1968 (Fla. 4th DCA Aug. 24, 2016), *jurisdiction accepted,* Case No. SC16-1752 (Fla. Oct. 14, 2016).

John Goodman moved for rehearing of the court's opinion dated May 25, 2016, which affirmed the ALJ's order determining the challenged rules to be valid. The court denied his motion for rehearing. Mr. Goodman was charged with DUI Manslaughter/Failed to Render Aid and Vehicular Homicide/Failed to Give Information or Render Aid after an automobile accident that caused the death of another person. Mr. Goodman's petition sought to exclude blood alcohol test results by challenging the validity of rules 11D-8.012 and 11D-8.013, Florida Administrative Code. For a discussion of the appellate court's May 25, 2016, opinion, see pages 8-9 of the September 2016 Administrative Law Section Newsletter.

Mr. Goodman also moved to certify questions of great public importance. The court certified without discussion the following questions to the Florida Supreme Court: (1) "Are the current rules of the Florida Department of Law Enforcement (FDLE) inadequate under *State v. Miles*, 775 So. 2d 950 (Fla. 2000), for purportedly failing to sufficiently regulate proper blood draw procedures, as well as the homogenization process to 'cure' a clotted blood sample?" and (2) "Are the present rules similarly inadequate for failing to specifically regulate the work of analysts in screening blood samples, documenting irregularities, and rejecting unfit samples?"

On October 14, 2016, the Florida Supreme Court accepted jurisdiction of the case. The initial brief on the merits was due November 3, 2016. As of November 1, 2016, the Court had not scheduled oral arguments in the case.

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The Administrative Law Section is hosting a Networking Nosh at the Ave Maria School of Law on Monday, February 6, 2017; Florida Coastal School of Law on Tuesday, February 7, 2017; the University of Miami School of Law on Thursday, February 23, 2017; and the St. Thomas University School of Law on Thursday, March 9, 2017.

We welcome Administrative Law Section members to participate. Please contact Sharlee Hobbs Edwards at sharlee.edwards@weston-ins.com; Vilma Martinez at vmartinez@avantegroup.com; or Judge Lynne Quimby-Pennock at lynne.quimbypennock@doah.state.fl.us for more details.

We need you!

DOAH CASE NOTES

Substantial Interest Hearings

Virginia Austin and Laura Tomayko v. Saddlebag Lake Owners Ass'n, Inc., DOAH Case No. 16-1799 (Recommended Order Sept. 15, 2016).

FACTS: Petitioners, two gay females, filed a housing discrimination complaint with the Florida Commission on Human Relations ("FCHR") alleging the Saddlebag Lake Owners Association, Inc., unlawfully discriminated against them on the basis of their sexual orientation. FCHR issued a notice of determination of no cause, and Petitioners filed a petition for relief, resulting in the case being transmitted to DOAH for a formal hearing.

OUTCOME: The ALJ recommended that FCHR enter a final order dismissing, with prejudice, the petition for relief. In reaching this recommendation, the ALJ first noted that the plain language of the pertinent statutes, sections 760.23(2) and 760.37, Florida Statutes, does not reference sexual orientation. The ALJ then discussed the body of law addressing whether discrimination on the basis of sexual orientation is sex discrimination under Title VII and observed that the cases are far from definitive. Petitioners relied on an administrative decision in which the Equal Employment Opportunity Commission concluded in Baldwin v. Foxx, 2015 EEOPUB LEXIS 1905 (EEOC July 16, 2015), that "sexual orientation is necessarily an allegation of sex discrimination under Title VII." However, the ALJ also noted that there were no decisions from a Florida appellate court or from the Eleventh Circuit, and that federal district court decisions within the Eleventh Circuit were split. Ultimately, the ALJ declined to expand the meaning of sex discrimination under chapter 760 by reasoning that "until the Eleventh Circuit, Supreme Court, or a Florida state court holds otherwise, or new legislation is enacted," he would follow the determination expressed by FCHR in its notice of determination of no cause that a discrimination claim based on sexual orientation is not actionable under chapter 760.

The Hospice of the Florida Suncoast, Inc., d/b/a Suncoast Hospice v. Ag. for Health Care Admin., et al., DOAH Case No. 15-5556CON (Recommended Order September 8, 2016), Rendition No. AHCA-16-0725-FOF-CON (Final Order Oct. 12, 2016).

FACTS: The Agency for Health Care Administration ("AHCA") published notice in the Florida Administrative Register that it had determined that there was a numeric need for one new hospice program in hospice service area 5B (consisting only of Pinellas County). Following a comparative review of several applications, AHCA issued notice on August 19, 2015, that it had preliminarily approved the application of Seasons Hospice & Palliative Care of Pinellas County, LLC ("Seasons"), and denied the other competing applications. The Hospice of the Florida Suncoast, Inc., d/b/a Suncoast Hospice ("Suncoast"), the only provider of hospice services in Pinellas County, filed a petition to contest AHCA's preliminary decision to approve Seasons' application.

OUTCOME: After a multi-day evidentiary hearing, the ALJ issued an Order recommending that AHCA approve Seasons' application. In doing so, the ALJ found that "Seasons will expand the availability and accessibility of hospice services to all segments of the community and will provide the residents of the service area with a high-quality alternative to Suncoast, with whom at least some have become disillusioned."

Separately, in addition to challenging AHCA's preliminary decision to approve Seasons' application, Suncoast had also filed a petition challenging the fixed need pool calculation published in April 2015, but AHCA issued a Final Order dismissing Suncoast's petition as untimely under AHCA's fixed need pool rule. Suncoast also challenged the fixed need pool rule, but DOAH issued a Final Order in Case No. 15-3656RX on September 28, 2015, concluding that the fixed need pool rule was valid. At the time of the Recommended Order in the instant case, both Final Orders were on appeal. Suncoast argued that the ALJ should include a determination that the Seasons application should be denied if Suncoast ultimately prevails after appeal on its challenge to the fixed need pool. However, the ALJ concluded that it was premature to address such issues until presented as an actual controversy, and that the Recommended Order had to be based on the facts and law in effect at the time.

In exceptions to the Recommended Order, Suncoast argued that the ALJ should have made alternative findings based on the possible success of the pending appeals, and Suncoast asked AHCA to "stay" the proceeding without issuing a Final Order until the appeals were resolved. AHCA rejected the Suncoast exceptions, and determined that it has no authority to "stay" proceedings prior to issuance of a Final Order. AHCA's Final Order adopted the recommended findings of fact and conclusions of law, and awarded a CON to Seasons. Shortly thereafter, the two appeals were resolved through per curiam affirmances by the First District Court of Appeal in Case No. 1D15-3985 (appeal of AHCA Final Order dismissing Suncoast's fixed need pool challenge as untimely) and Case No. 1D15-4847 (appeal of DOAH Final Order determining that the fixed need pool rule is valid).

Disciplinary/Enforcement Actions

Dep't of Fin. Serv., Div. of Workers' Compensation v. Soler and Son Roof-

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ing, DOAH Case No. 15-7356 (Recommended Order July 19, 2016).

FACTS: The Department of Financial Services, Division of Workers' Compensation ("DFS") enforces the statutory requirement that employers secure workers' compensation coverage. In the course of fulfilling that duty, the Division assesses against any employer failing to secure the payment of workers' compensation "a penalty equal to" the greater of $1,000 or "2 times the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll during periods for which it failed to secure the payment of workers' compensation . . . within the preceding 2-year period." § 440.107(7)(d)1, Fla. Stat. (emphasis added). On November 22, 2015, Soler and Son Roofing ("Soler") hired a new employee (Mr. Lee), who was to start work the following morning at $10 per hour. However, no one at Soler notified the employee leasing company that handled Soler's workers' compensation coverage. On November 23, 2015, a DFS investigator conducted a random inspection of a Soler worksite and determined there was no workers' compensation coverage for Mr. Lee. DFS ultimately issued an Amended Order of Penalty Assessment proposing to penalize Soler $63,434.48. In calculating the penalty, DFS assumed that Soler had failed to secure workers' compensation coverage for Mr. Lee for two years (rather than for a single day) because Soler could not produce any documentation of workers' compensation coverage prior to August 1, 2014. That action was based on an interpretation of Rule 69L-6.028(2) that provides for a penalty assessment to be based on a two-year period even when the evidence demonstrates one or more periods of noncompliance totaling less than two years.

OUTCOME: The ALJ concluded that the amount of Soler's penalty should be based on one day of noncompliance rather than two years. In doing so, the ALJ concluded that DFS's interpretation of Rule 69L-6.028(2) conflicts with section 440.107(7)(d)1, Florida Statutes, and thus amounts to an invalid delegation of legislative authority. Prior to July 1, 2016, the ALJ lacked the authority to invalidate rule 69L-6.028(2). However, the ALJ noted that section 120.57(1)(e)1., Florida Statutes, now provides that neither an agency nor an administrative law judge may "base agency action that determines the substantial interests of a party on . . . a rule that is an invalid exercise of delegated legislative authority."

Dep't of Bus. & Prof'l Regulation, Construction Industry Licensing Bd. v. Michael E. Seamon, DOAH Case No. 16-2845PL (Recommended Order Oct. 5, 2016).

FACTS: At all relevant times, Michael E. Seamon was a Florida-licensed commercial pool/spa contractor. On April 4, 2016, the Department of Business and Professional Regulation ("DBPR") filed an amended administrative complaint alleging in pertinent part that Mr. Seamon violated section 455.227(1)(o), Florida Statutes, by practicing beyond the scope of his license. The act in question involved the replacement of a swimming pool light at a residence in Panama City Beach.

OUTCOME: The ALJ concluded that "there is no reasonable way to construe the statutory parameters as a whole in a way that allows pool/spa contractors to perform electrical work, regardless of its purported simplicity or of the inclination of pool/spa contractors to perform such work." In the course of reaching that conclusion, the ALJ noted that Mr. Seamon had asserted in an amended petition for formal hearing that DBPR's position amounted to the application of an unadopted rule. However, because DBPR's alleged reliance on an unadopted rule was not identified as an issue of law or fact in the parties' joint prehearing stipulation, the ALJ concluded that this issue had been waived. See Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc., 174 So. 3d 1037 (Fla. 4th DCA 2015). Nevertheless, the ALJ addressed Mr. Seamon's defense and DPBR's argument that the 2016 amendments to section 120.57(1)(e), Florida Statutes, could not be applied to the instant case because they created new, substantive rights by establishing a new defense. With regard to Mr. Seamon's unadopted rule allegation, the ALJ concluded that there was insufficient evidence to conclude that DBPR's interpretation of the pertinent statutes amounted to an unadopted rule. As for DBPR's assertion, the ALJ concluded that "[t]he 2016 amendments to sections 120.57 create no new substantive rights, but serve only to establish a procedure by which a substantially affected party may enforce pre-existing rights against the application of

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an unadopted rule. Thus, the 2016 amendments to section 120.57(1)(e) are procedural in nature and may be applied in this case."

Rule Challenges

Grabba-Leaf, LLC, v. Dep't of Bus. & Prof'l Regulation, Div. of Alcoholic Beverages & Tobacco, DOAH Case No. 16-3160RU (Recommended Order August 26, 2016).

BACKGROUND/FACTS: The Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("DABT") is the agency responsible for taxing tobacco products. Section 210.25(12), Florida Statutes, defines "tobacco products," in part, to include loose tobacco suitable for smoking. In DOAH case 14-3486, Judge Van Laningham recommended that the tax assessment against the cigar wraps sold by Brandy's Product be set aside because those cigar wraps could not be considered loose tobacco suitable for smoking. After the First District Court of Appeal reversed DABT's Final Order rejecting Judge Van Laningham's recommendation, DABT issued a memorandum to cigar wrap distributors announcing that it would continue to tax "whole leaf, non-homogenized tobacco products." Grabba-Leaf, LLC ("Grabba-Leaf"), a seller of whole leaf, non-homogenized cigars wraps, filed a petition alleging that DABT's memorandum amounted to an unadopted rule.

OUTCOME: The ALJ began his analysis by noting that an agency statement that applies a clear and unambiguous statute in a manner consistent with the statute's plain meaning is not a "rule" within the meaning of section 120.52(16), Florida Statutes. The ALJ then concluded that DABT's memorandum was not an unadopted rule because "it is readily apparent that whole leaf, non-homogenized cigar wraps meet the statutory definition of loose tobacco suitable for smoking. They have been taxed since 2009 without a rule and can continue to be taxed without a rule."

Dania Entm't Center, Inc., et al., v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering, Case Nos. 15-7010RP, 15-7011RP, 15-7012RP, 15-7013RP, 15-7014RP, 15-7015RP, 15-7016RP, and 15-7022RP (Final Order August 26, 2016).

FACTS: With the exception of certain card games played in cardrooms at licensed pari-mutuel wagering facilities, casino-style gambling is illegal in Florida. That prohibition encompasses "banking games" in which "the house is a participant in the game, taking on players, paying winners, and collecting from losers or in which the cardroom establishes a bank against which participants play." § 849.086(2)(b), Fla. Stat. In contrast, authorized games under section 849.086 are played in a "non-banking manner" in which the players play against each other and not against the cardroom operator. The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division") is the agency responsible for regulating pari-mutuel wagering in Florida. In response to requests from cardrooms for authorization to conduct designated player games, the Division adopted rules 61D-11.001(17) and 61D-11.002(5) on July 21, 2014. The first of these rule provisions defines "designated player," and the second provides that "[c]ard games that utilize a designated player that covers other players' potential wagers shall be governed by the cardroom operator's house rules." Rule 61D-11.002(5) indicates the Division had determined that designated player games did not violate the prohibition against "banking games." Moreover, the Division subsequently approved internal controls submitted by several pari-mutuel wagering facilities that described player banked games. On October 29, 2015, the Division published proposed amendments to chapter 61D-11. Those proposed amendments included proposed repeals of rules 61D-11.001(17) and 61D-11.002(5). In addition, the Division proposed to amend rule 61D-11.005 to provide that "[p]layer banked games, established by the house, are prohibited." During a public hearing on December 2, 2015, the Division's director explained that the intent behind the proposed amendments was to change the Division's long-standing interpretation of section 849.086 so that designated player games would now be prohibited. After the public hearing and prior to the adoption of any amendments to chapter 61D-11, the Division issued a series of administrative complaints against cardrooms offering designated player games. Those complaints reflected the Division's newly-formulated position that designated player games amounted to banking games. On February 4, 2016, the petitioners (all of whom have been approved to offer designated player games at their cardrooms) filed amended petitions challenging the proposed repeal of rules 61D-11.001(17) and 61D-11.002(5).

OUTCOME: The ALJ concluded that the proposed repeal of rules 61D-11.001(17) and 61D-11.002(5) amounted to an invalid exercise of delegated legislative authority. In doing so, the ALJ stated that the Division "has taken divergent views of [section 849.086] in a manner that has substantially affected the interests of Petitioners. For [the Division] to suggest that its repeal of the rules is a clarification, a simplification, or a reflection of the unambiguous terms of the statute, and that Petitioners should just tailor their actions to the statute without any interpretive guidance from [the Division], works contrary to the role of government to provide meaningful and understandable standards for the regulation of business in Florida. [The Division] cannot, with little more than a wave and well-wishes, expect regulated businesses to expose themselves to liability through their actions under a statute that is open to more than one interpretation, when the agency itself has found it problematic to decipher the statute under which it exercises its regulatory authority." While the ALJ recognized that an agency

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can change its position on an issue, "eliminating all interpretive rules, leaving regulated entities to decipher the agency's current policy regarding the construction of its enabling legislation, is not the appropriate way to change direction."

The Division has appealed the Final Order to the First District Court of Appeal, where the appeal has been assigned Case No. 1D16-4275.

John David Rouse and Elizabeth G. Yoskin v. Dep't of Law Enforcement, DOAH Case No. 16-2579RX (Recommended Order Sept. 9, 2016).

FACTS: The Florida Department of Law Enforcement ("FDLE") is the state agency responsible for regulating the operation, inspection, and registration of breath test instruments utilized under the driving and boating under the influence provisions of chapters 316, 322, and 327, Florida Statutes. Prior to July 29, 2015, the Intoxilyzer 5000 and the Intoxilyzer 8000 were FDLE-approved breath testing instruments. The Intoxilyzer 5000 was developed in the 1970s and possesses the computing power of an Atari video game system. In contrast, the newer Intoxilyzer 8000 has much more computing power and data storage capability. Moreover, the Intoxilyzer 5000's accuracy rate is plus or minus 5% while the Intoxilyzer 8000's accuracy rate is plus or minus 3%. Since July 29, 2015, the Intoxilyzer 8000 is the only FDLE-approved breath testing instrument. John David Rouse and Elizabeth G. Yoskin ("Petitioners") are defendants in pending criminal prosecutions and have been charged with driving under the influence in violation of section 316.193, Florida Statutes. The State of Florida intends to use the results of Intoxilyzer 8000 tests as evidence that Petitioners had unlawful breath alcohol levels at the time of their respective charged offense. Petitioners filed a rule challenge petition with DOAH on May 11, 2016, alleging that rule 11D-8.002 is arbitrary and capricious for maintaining a 5% acceptable range standard when the Intoxilyzer 8000's manufacturer specifications state that its accuracy range is plus or minus 3%. The petition alleged that the rule was rendered invalid when FDLE adopted the Intoxilyzer 8000 as the only approved breath testing instrument to be used in Florida.

OUTCOME: The ALJ rejected Petitioners' argument that rule 11D-8.002 is arbitrary and capricious. In doing so, he noted that the current manager of FDLE's alcohol testing program "testified as to FDLE's rationale for declining to move to the 3% standard, including his opinion that the Intoxilyzer 8000 may not be capable of meeting the 3% standard under field conditions. It is one thing to meet the standard in the controlled conditions of and FDLE lab with highly trained FDLE inspectors. It might be quite another thing to meet the standard at 3:00 a.m. in a local law enforcement agency's holding cell. Dr. Kirkland reasonably opined that the 5% standard takes into account all the variables external to the Intoxilyzer 8000 itself, and is consistent with the accuracy standards in force in nearly every other state and accepted by the National Highway Traffic Safety Administration."

Petitioners have appealed to the First District Court of Appeal, Case No. 1D16-4596.

Bid Protests

National Development Foundation, Inc. v. Fla. Housing Fin. Corp., DOAH Case No. 16-3099BID (Recommended Order July 18, 2016).

FACTS: The Florida Housing Finance Corporation ("FHFC") is a public corporation created by statute that provides financial assistance to facilitate the creation of affordable housing opportunities in Florida. On January 22, 2016, FHFC issued Request for Applications 2016-101 ("the RFA") to compete for funds available to loan applicants to help finance their projects. The RFA required applicants to disclose the amount and sources of their anticipated financing. If an applicant anticipated receiving financing from a source other than a bank or credit union (i.e., a non-corporate lender), then that applicant had to provide evidence of the non-corporate lender's ability to fund the loan, including the non-corporate lender's financial statements. The National Development Foundation ("NDF") responded to the RFA and proposed obtaining a first mortgage from Neighborhood Lending Partners, Inc. ("NLPI"), a non-corporate lender. Because NDF did not include NLPI's financial statements with its application, FHFC's review committee recommended that NDF's application be deemed ineligible. FHFC's Board of Directors approved that recommendation during a meeting on May 6, 2016. During the same meeting, the Board considered an application from Grove Pointe for financing submitted in response to a different RFA. Like NDF, Grove Pointe also anticipated receiving funding from NLPI. However, rather than deeming Grove Pointe ineligible for funding, the Board of Directors accepted a staff recommendation that Grove Pointe be offered funding if it could submit acceptable evidence of NLPI's ability to provide financing within 21 days after the meeting. On May 23, 2016, NDF filed a formal written protest alleging that its application was not materially nonresponsive. In support of that assertion, NDF cited FHFC's treatment of Grove Pointe's application and argued that administrative stare decisis required FHFC to give NDF's application the same treatment.

OUTCOME: The ALJ agreed with NDF's argument by concluding that "the Grove Pointe Decision is indistinguishable from the instant case, as NDF's application is identically nonconforming. Logically, NLPI cannot simultaneously be both financially sound (Grove Pointe) and financially suspect (NDF). Thus, what was a minor irregularity in the other case must be the same here. FHFC's determination to the contrary – namely that the NDF [application] is ineligible due to a material deviation in its application (i.e., the omission of proof of NLPI's ability to fund) – was clearly erroneous."

The Administrative Law Section's New Social Media Presence

by Gregg Morton

While some practitioners have been quick to embrace new technology and the use of social media, many lawyers have viewed platforms like Facebook, LinkedIN, Twitter, and others as novelties and with skepticism as to their value to the actual practice of law. In the June 2016 issue of *The Florida Bar Journal*, Chief Justice Labarga gave a detailed explanation of the importance of social media to the legal profession. In his article addressing the implementation of the new state courts communication plan, he encouraged lawyers and judges to venture into the new communication technologies in order to show how the legal system is achieving justice and enforcing due process in a way that is transparent and accountable. Additionally, in the Section's most recent evaluation, the Program Evaluation Committee (PEC) of The Florida Bar encouraged the Section to create a presence on social media to encourage younger members to join the Section.

The Administrative Law Section has embraced Justice Labarga's and the PEC's call to action by recently entering the social media arena, creating both a Section Facebook page and a LinkedIN group. An initial goal for the Section is to encourage members to sign up for these new social media platforms. To follow the Section on Facebook, attorneys can visit the Section's Facebook page at http://bit.ly/2eBzWrj and "like" the Section's page. Similarly, members of the Section with LinkedIN profiles can join the Section's group page by going to http://bit.ly/2eWBpeC. The Section would also challenge members to heed Justice Labarga's call to "supply the content." If you know of administrative lawyers doing interesting and positive things, if you have pictures from events that would be of interest to your fellow practitioners and the public, or if you are aware of new developments in administrative law or important cases, we would encourage you to reach out to the Section and let us know so that we can spread the word on social media. You can contact Cristina Shideler at christina.shideler@deo.myflorida.com and Gregg Morton at greggrileymorton@gmail.com with your material. We look forward to creating a robust presence for the Section on social media and communicating with members of the Section and the public on the importance of administrative law.

CALL FOR AUTHORS: ADMINISTRATIVE LAW ARTICLES

One of the strengths of the Administrative Law Section is access to scholarly articles on legal issues faced by administrative law practitioners. The Section is in need of articles for submission to *The Florida Bar Journal* and the Section's newsletter. If you are interested in submitting an article for the Bar Journal, please email Stephen Emmanuel (semmanuel@ausley.com), and if you are interested in submitting an article for the Section's newsletter, please email Jowanna N. Oates (oates.jowanna@leg.state.fl.us). Please help us continue our tradition of advancing the practice of administrative law by authoring an article for either the Bar Journal or the Section's newsletter.

Agency Snapshot: Department of Citrus

by Suzanne Van Wyk

The Department of Citrus is headquartered in Bartow, Florida, and is charged with marketing, research, and regulation of the Florida Citrus Industry. Its mission is to "maximize demand for Florida citrus products in order to ensure the sustainability and economic well-being of the Florida citrus grower, the citrus industry, and the state." The Department executes marketing initiatives for Florida citrus products in the United States, Canada, Europe, and Asia to reach consumers, key influencers, and health professionals. The Department has an extensive regulatory function, including research, production, fertilizing, maturity standards, harvesting, licensing, transportation, labeling, packing and processing.

The Florida Citrus Commission, which was created in 1935, is the Department's governing body, and currently consists of nine members appointed by the Governor to represent citrus growers, processors, and packers. The Florida Citrus Code was enacted in 1949, and is currently codified in chapter 601, Florida Statutes.

The Department's activities are funded by a tax paid by growers on each box of citrus that moves through commercial channels. Commissioners set rates in October after the initial United States Department of Agriculture (USDA) citrus crop forecast. The final tax rate for the season is based on several factors, including crop size, import projections, carryover, and fund balance. According to the Department, the citrus industry employs nearly 62,000 people and provides an annual economic impact of nearly $10.7 billion to the state.

Agency Secretary:
Shannon R. Shepp, Executive Director

Agency Clerk:
Alice Wiggins
awiggins@citrus.myflorida.com
Florida Department of Citrus
Legal Department
P.O. Box 9010
Bartow, FL 33931-9010
Phone (863) 537-3984
Fax (850) 617-6493

Hours for Filings:
8:00 a.m. to 5:00 p.m.

According to the Statement of Agency Organization, the following also apply:

RULES GOVERNING ELECTRONIC TRANSMISSION:

1. A party who files a document by electronic transmission represents that the original physically signed document will be retained by that party for the duration of the proceeding and of any subsequent appeal or subsequent proceeding in that cause, and that the party shall produce it upon the request of other parties.

2. That a party who elects to file a document by electronic transmission shall be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document may not be properly filed with the clerk as a result.

3. That the filing date for an electronically transmitted document shall be the date the business unit or agency clerk receives the complete document. Any document received after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day.

Physical Address
Bob Crawford Agricultural Center
605 East Main Street
Bartow, Florida 33830
(863) 537-3999

General Counsel:
General counsel services are provided by the firm of Valenti, Campbell, Trohn, Tamayo & Aranda, PA (existing contract expires June 30, 2017); firm partner Henry B. Campbell is a former Department General Counsel and partner Elliott Mitchell is a former Acting General Counsel.

The Office of Attorney General also provides legal services on an "as needed" basis.

Number of Lawyers on Staff: 0

Kinds of Cases:
Rulemaking challenges, statutory interpretation, and compliance with Florida Citrus Code (chapter 601, Florida Statutes) and chapter 20, Florida Administrative Code; as well as contract, procurement, and personnel matters.

Practice Tips:
About 80 percent of the Department's activities relate to marketing and promotion of Florida's citrus products at home and abroad. Although the Department does license citrus growers, packers, and processors, it is not frequently involved in administrative litigation.

A recent search of the Division of Administrative Hearings' website revealed only 13 cases in which the Department of Citrus has been a respondent since 1985. The majority of those were rule challenges, with the next largest group being denials of applications for fruit dealer licenses. One case in 1987 was a labeling enforcement action.

During the same time period, the Department initiated two administrative cases. One was a license disciplinary action (in which the Department of Agriculture intervened challenging the Department's jurisdiction), and the other was a challenge to another agency's rule.

Student loan refinancing for Florida Bar members

SoFi saves attorney borrowers an average of $431 a month[1]

Apply through **SoFi.com/FloridaBar** to get a **$300 welcome bonus**[2] when you refinance your student loans.

Terms and Conditions Apply. SOFI RESERVES THE RIGHT TO MODIFY OR DISCONTINUE PRODUCTS AND BENEFITS AT ANY TIME WITHOUT NOTICE. See sofi.com/legal for a complete list of terms and conditions. SoFi loans are originated by SoFi Lending Corp (dba SoFi) California Finance Lender #6054612. NMLS #1121636. [1]Monthly savings calculation is based on all SoFi members with a pharmacist degree who refinanced their student loans between 7/1/15 and 6/30/16. The calculation is derived by averaging the monthly savings of SoFi members with a pharmacist degree, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time (projections for variable rates are static at the time of the refinancing and do not reflect actual movement of rates in the future) 2) members make all payments on time. SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 25 years 3) the SoFi member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount. [2]Payment will be issued electronically once you become a SoFi borrower; you have submitted a completed application with documents and your loan has been disbursed. Offer good for new customers only.

Law School Liaison

November 2016 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

Our Fall 2016 faculty scholarship brochure, highlighting the extraordinary productivity of our College of Law's faculty, is now available online at: https://issuu.com/fsucollegeoflaw/docs/fsulaw_faculty_scholarship2016_web_/1. Our Environmental Law Program continues to earn national recognition; for 2016 it is again ranked in the top 20 nationally by *U.S. News & World Report*, for the twelfth consecutive year.

This column highlights recent accomplishments of our College of Law students and faculty. It also features several of the programs the College of Law hosted this semester.

Recent Student Achievements

- The Environmental Law Society (ELS) has already had a busy year, with more events planned. The ELS is creating a Mentoring Directory and invites members of the Section whose practice includes land use, environmental, energy, or natural resources law to contact Travis Voyles (e-mail: tav14@my.fsu.edu) to participate. In addition, the ELS recently organized a very successful career panel for students interested in administrative law and environmental law topics. Participants included representatives from government agencies, private firms, and nonprofit organizations.
- Brian Labus's article, "The Clean Power Plan and the Death of Coal", will be published in *Environs*, the Environmental Law and Policy Journal at the University of California-Davis School of Law, Volume 40.
- Mallory Neumann recently completed a summer fellowship position with the University of California Los Angeles (UCLA) School of Law's Resnick Program for Food Law and Policy. She is currently working on a project through the *Harvard Food Law and Policy Clinic Farm Bill Consortium* researching Title IV-Nutrition to recommend policy proposals for the next farm bill. Ms. Neumann has been invited to attend the Harvard Food Law & Policy Clinic's Food Law Student Leadership Summit in Iowa this September, and is currently serving an internship with the Florida Department of Agriculture & Consumer Services, Office of General Counsel.

Recent Faculty Achievements

- FSU's Environmental Law faculty members have recently been recognized by the *Land Use & Environment Law Review*, a peer-selected annual publication of significant legal scholarship in land use and environmental law. Two of Professor Hannah Wiseman's articles were selected for republication in the 2016-2017 edition, "The Fracking Revolution: Shale Gas as a Case Study in Innovation Policy" and "Regulatory Islands." In addition, Professor Shi-Ling Hsu's article, "The Accidental Postmodernists: A New Era of Skepticism in Environmental Policy," and Professor David Markell's article, "A Holistic Look at Agency Enforcement" were among the 25 finalists for this honor out of over 110 qualifying articles. FSU had the most papers selected of any law school in the United States, with four papers in total. Since 2000, FSU professors have had eight papers recognized by the *Land Use & Environment Law Review*, fourth best in the United States.
- Shi-Ling Hsu presented his work in progress, "Human Capital in a Climate-Changed World," at the Sustainability Conference for American Legal Educators in Tempe, AZ, and at the 8th Annual Meeting of the Society for Environmental Law and Economics, in Austin, TX.
- Steve Johnson published his article "*Seminole Rock* in Tax Cases" as part of an Online Symposium for *Notice & Comment*, the blog of the Yale Journal on Regulation and the American Bar Association's Section of Administrative Law & Regulatory Practice.
- David Markell has been named Associate Dean for Research at the College of Law. His article, *Dynamic Governance in Theory and Application, Part I* (with Prof. Robert L. Glicksman) was published in 58 Arizona L. Rev. 563 (2016).
- Erin Ryan was appointed the Elizabeth C. and Clyde W. Atkinson Professor of Law at FSU and elected to the Board of Directors to the international Association for Law, Property, and Society. In June, she traveled to China, where she presented on American multilevel environmental governance at Ocean University in Qingdao and Tsinghua University in Beijing. In Beijing, she participated in *Pathways to a Clean Environment: Law,*

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Enforcement, and the Public in China and the U.S., a conference co-sponsored by the University of Chicago and Tsinghua University. In May, she traveled to Northern Ireland to present on American federalism and secession at the Association for Law, Property, and Society conference at Queens University in Belfast. This summer, she published *Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States*, 46 ENVTL. L. 277 (2016). She recently provided press interviews to the Xinhua News Agency in China about toxic playground equipment in Beijing; to Power Magazine in the U.S. about the Clean Power Plan case; and to Bloomberg BNA about the constitutionality of promises by presidential candidates to abolish the EPA and Department of Energy.

- Hannah Wiseman presented her article on "Regional Energy Governance and U.S. Carbon Emissions" (co-authored with Hari Osofsky) at the Society for Environmental Law and Economics conference at the University of Texas Law School and delivered a "hot topics" presentation on energy preemption at Vermont Law School. Her upcoming publications include HYDRAULIC FRACTURING: A GUIDE TO THE ENVIRONMENTAL AND REAL PROPERTY ISSUES (with Keith B. Hall) (American Bar Association) (forthcoming 2016); ENERGY LAW CONCEPTS & INSIGHTS (with Alexandra B. Klass) (Foundation Press) (forthcoming 2016); and The Environmental Risks of Shale Gas Development and Emerging Regulatory Responses: A U.S. Perspective, in HANDBOOK OF SHALE GAS LAW AND POLICY (Tina Hunter, editor) (Intersentia) (forthcoming 2016).

Recent and Upcoming Events

Environmental Law Without Courts

On September 16, 2016, FSU Law brought together prominent administrative and environmental law scholars from across the country to explore different ways in which administrative agencies have implemented environmental policies largely without court supervision or intervention. For a full list of participants and the topics covered, please visit our Environmental Law without Courts conference webpage: http://www.law.fsu.edu/news-and-events/2016-environmental-law-without-courts-conference.

Environmental Certificate & Environmental LL.M. Luncheon Speaker

Professor Blake Hudson, Burlington Resources Professor of Environmental Law and Edward J. Womac, Jr. Professor of Energy Law, Paul M. Herbert Law Center Louisiana State University. We were delighted to welcome Professor Hudson on October 5, 2016, as our first Environmental Certificate and Environmental LL.M. Luncheon Speaker of the semester.

Fall 2016 Distinguished Lecture

Professor Robert Percival, Robert F. Stanton Professor of Law and Director of Environmental Law Program, University of Maryland Francis King Carey School of Law, lectured on October 19, 2016. This lecture was approved by the Florida Bar for 2 CLE credits.

Environmental Certificate & Environmental LL.M. Luncheon Speaker

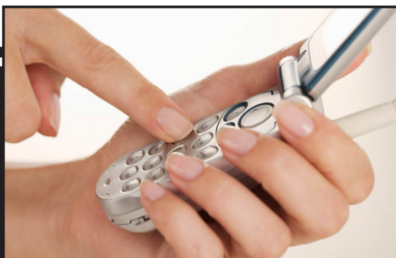
Professor Roberta Mann, Mr. and Mrs. L. L. Stewart Professor of Business Law, University of Oregon School of Law, spoke at the Environmental Certificate & Environmental LL.M. luncheon on November 16, 2016.

Networking Luncheon

Michael Gray, United States Department of Justice Environment and Natural Resources Division and Captain Michael Palmer, CAPT, JAGC, USN, Force Judge Advocate, Naval Education and Training Command, served as the speaker at a networking luncheon held on October 24, 2016.

Information on upcoming events is available at http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events. We hope Section members will join us for future events.

Ethics Questions?



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ALJ Q&A

by Richard J. Shoop

For this edition of ALJ Q&A, I had the opportunity to sit down with the Division of Administrative Hearings' ("DOAH") newest administrative law judge ("ALJ"), the Honorable Yolonda Green, who became an ALJ on August 1, 2016. Judge Green is currently assigned to the northern district at DOAH. Before joining DOAH, Judge Green was an attorney supervisor with the prosecution services unit at the Department of Health ("DOH") and served at DOH since 2004, except for a three-year stint with Wicker, Smith, O'Hara, McCoy and Ford in Orlando from 2006 to 2009. Judge Green is a graduate of the University of Florida Levin College of Law where she served on the trial team and Frederick Douglass national moot court competition team. She was an adjunct professor at FAMU in 2010 and 2011, where she taught undergraduate courses in labor relations and collective bargaining. She has been active in the Florida Bar, the Tallahassee Barrister's Bar Association, Legal Services of North Florida, Delta Sigma Theta Sorority, and the Boys Choir of Tallahassee, to name just a few of her outside interests. Judge Green was kind enough to allow me to interview her during lunch recently, and we had a very good conversation, which appears below.

RS: How did you become involved in the practice of administrative law?

YG: That's a good question. So my initial interest out of law school was in health care law. I applied for a position with the Department of Health, and, as I worked there, I became more and more interested in administrative law. It's one of those things where you fall into it as a byproduct of another area of law.

RS: What made you decide to become an ALJ?

YG: One thing I liked about the ALJ position is that you truly are a problem solver. You have a set of facts, the issues, the law, and you are trying to figure out how all of that fits together. And you don't have any stake in the outcome. My focus as an ALJ is to do the right thing based on the evidence presented at the hearing.

RS: What do you enjoy the most about being an ALJ?

YG: I would say being able to problem solve. You see the facts, but you see them from a different perspective than the parties do. It's like sporting events. You know there is going to be a winner and a loser at some point. The ALJ is like the neutral referee who objectively evaluates the case.

RS: What is the most common mistake you see attorneys who practice in front of you make?

YG: I've had two hearings, and this has come up in both of them. It relates to not laying the foundation for hearsay exceptions. If an attorney lays the proper foundation for a hearsay exception, that evidence may be relied upon for a finding of fact. Otherwise, hearsay may not be relied upon, without anything more, for a finding of fact.

RS: I know that you are still new, but, so far, what does a typical day looks like for you?

YG: Well, usually the day starts the day before. Depending on what I have going on, I will plan the week ahead of time. So, for instance, yesterday I planned for today. When I have a pending motion, I review the file to determine the status and history of the case. If I set a motion hearing, I will prepare a shell of the order I'll be entering so that, after the hearing, I am prepared to complete the order and enter it that day. So if there are any pending motions, that kind of thing, what I will do is I will review to files and see what orders I will need to enter the next day. My whole thing is preparation, preparation, preparation. If you are prepared to handle all the things you can control, then you will be prepared to handle the things (i.e., emergency motions) that are beyond your control because your time will be freed up for it.

RS: How do you use technology in your work?

YG: Technology is the name of the game for me. I have a lot of electronic forms because one, my handwriting is atrocious, and two, it helps me keep track of a lot of things. I haven't done this yet, but I plan to sync my calendar on my phone with my calendar at the office so that way I will have everything at my fingertips. If you know about our typical day, our technology is so important. I look at the daily filings [on DOAH's intranet website] for each of my cases. I think the electronic filing is amazing because anything you need from the docket you can access electronically [on DOAH's website]. In addition, on the day of a hearing, sometimes you'll have parties file something after 5:00 p.m. [the day before], so I'll have access to the docket for such filings when I get to the hearing.

RS: In your opinion, what has been the most significant change in the practice of administrative law since you've started practicing?

YG: I would say that, in regard to practicing at DOAH, moving to the electronic filing has been the most effective and efficient way for handling matters that are at DOAH. It is more efficient for the parties and ALJs.

RS: What is the most important piece of advice you could give a young lawyer that you had wished someone had given you when you were first starting out?

YG: As a young lawyer, and even

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now as a new ALJ, I'd say trust your instincts. If you trust your instincts, you can't go wrong. Even if it turns out bad, or it's not the desired outcome, that's okay. Also, every young lawyer should have a mentor.

RS: What do you like to do for fun?
YG: Running, hiking, all things outdoors. I love to travel and then I write about my travel experiences.

RS: I know that being an ALJ is very time-consuming. So how do you manage to balance your work and your personal life?
YG: For me, work-life balance is a priority. When I'm at work, I'm focused on work, except for emergencies. And then when I'm at home, I try not think about work. I don't want to blur those lines. I've done that in the past, and it's all-consuming. You need to recharge, and if you don't separate your work and personal life you don't have the opportunity to recharge. If you don't recharge, then you're not effective. That's the way I look at it. During the week, I will usually go to the gym, or I will go cycling, running, etc. On weekends I find some cool thing to do, whether an activity in town (or out of town) or a project. Something that gets my mind off work.

RS: When it's all said and done, how would you like to be remembered as an ALJ?
YG: That is a very good question. I want to be remembered as proactive, effective, and fair. On the proactive side, I think it's important to just know what is going on with your docket and not just let things come to you. Being aware of everything that is there. In terms of being effective, I think that recognizing that any order that you issue and action that you take will impact the flow of a case. And then being fair, where the parties, while they may not have received the desired outcome, at least the parties know that they had their day in court. I think that is probably the most important part of our job.

***Richard J. Shoop** is the Agency Clerk for the Agency for Health Care Administration. He attended the University of Miami for both undergraduate studies and law school, obtaining a Bachelor of Arts in History with General Honors in 1996 and a Juris Doctor in 1999. He began his legal career at the Quincy office of Legal Services of North Florida, Inc. In 2001, Mr. Shoop went to work for the State of Florida, first with the Agency for Health Care Administration and then with the Department of Health as a prosecuting attorney for the Boards of Medicine, Osteopathic Medicine and Psychology. He accepted the position of Agency Clerk for the Agency for Health Care Administration in 2004. Mr. Shoop has been a member of the Administrative Law Section's executive council since 2009, and is currently serving as the immediate past chair.*

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always obvious. For me, the value was an unexpected opening into a career in state government that resulted from one encounter with a particular attorney on a very unique case. When I was working at Legal Services of North Florida, I had a client who needed assistance obtaining pension benefits from her deceased spouse's employer. The employer had filed a declaratory judgment action in circuit court asking the court to determine who was legally entitled to the pension benefits. My client claimed to be the common law wife of the deceased (having qualified as such well before Florida did away with common law marriage in 1968), and the deceased had listed her as such on his pension documents. Her status as the deceased's spouse had been challenged by the deceased's legal wife, whom he had left after a few years of marriage (but never divorced) prior to meeting my client and living with her for over 30 years. The first wife was represented by an attorney who was vigorously advocating for her client. The case dragged on for a few months, and the judge urged the parties to try to reach a settlement in lieu of further litigation. Opposing counsel and I reached an agreement whereby our clients would meet in order to see if they could work out a resolution to the case. The meeting was very heated, but they came to an agreement that the employer approved, and the case was resolved with each woman receiving a percentage of the deceased's pension benefits for the remainder of their lives. Several months later, I was looking for a new job opportunity. I had applied for a position with a state agency, and received a phone call a few days later. It was the same attorney I had dealt with on the pension case. The attorney was now the supervisor over the position I had applied for within the agency, and remembered me from that case. She told me that she was very impressed by my work on that case, and wanted to hire me. That is how I began my career in state government, and it was all because I tried my best to be nice even in the most difficult and contentious situation I had faced up to that point in time.

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The Consequences of Not Always Being Nice

The Florida Bar expects lawyers to "abstain from rude, disruptive, and disrespectful behavior" and "be civil and courteous in all situations, both professional and personal, and avoid conduct that is degrading to the legal profession."[2] However, as anyone who has practiced law knows, there are attorneys who do not abide by those expectations. When attorneys are confronted with unprofessional behavior during the course of litigation, they have a choice to make. Either they can remain professional, or they can respond in kind, instead of focusing on the case itself. I recommend attorneys do the former, for the latter does not usually work out to your benefit. By way of example, there was a recent case that involved the denial of an assisted living facility's licensure renewal application. It was referred to the Division of Administrative Hearings ("DOAH") for an evidentiary hearing before an administrative law judge ("ALJ"). There was a lot of contention between both parties' attorneys during the course of the litigation. Several discovery disputes resulted in motions for sanctions being filed by counsel on each side[3], and they were not willing to stipulate to any facts or law related to the case[4], which resulted in the filing of unilateral pre-hearing statements. The ALJ who presided over the case took note of the attorneys' conduct, and felt the need to specifically address it in the Preliminary Statement of the Recommended Order he entered in the case, stating:

> The final hearing in this matter was emotionally charged. The denial of [the] application for licensure renewal is tantamount to closure of the Facility. The Agency aggressively sought to guarantee compliance with all rules and regulations governing assisted living facilities, regardless of the ultimate impact on the residents. [The Facility] battled furiously to maintain its license without acknowledging its own shortcomings. Neither party seemed willing to compromise, view the evidence objectively, or pursue resolution; there was instead an air of all-out war during this entire proceeding. The actions of both counsel in this proceeding brought to mind these words contained in the Oath of Admission to The Florida Bar: "To all opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications. I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged."

The ALJ's comments concerning counsel for both parties were in addition to prior admonishments he had given them in orders on discovery motions that were filed prior to the hearing. While "[c]ompetent, zealous representation is required when working on a case for a client[,] [t]here are proper types of behavior and methods to utilize when aggressively representing a client."[5] Attorneys need not engage in an "all-out war" in order to successfully advance the position of their clients.

When you encounter an attorney who acts in the same manner as was described by the ALJ in the example above, do not respond in kind. The Florida Supreme Court has found that "even if one considers opposing counsel to be annoying or unpleasant, that does not provide a license for an attorney to engage in misconduct."[6] Remaining professional when confronted with unprofessional conduct shines a spotlight on the other attorney's unprofessional conduct and might also improve your position in the eyes of the judge. Additionally, you should not hesitate to report unprofessional conduct. Both the Attorney Consumer Assistance and Intake Program and Local Professional Panels were established as the means by which complaints about an attorney's unprofessional conduct could be received and resolved[7], and the Florida Supreme Court will discipline attorneys for unprofessional conduct because it "is an embarrassment to all members of The Florida Bar."[8]

The Importance of Always Being Nice as It Pertains to Email Communications

There is no doubt that we live in the electronic age, and email communications are a vital tool to all attorneys' practices. It can be a great communication tool when used properly. However, it is all too common to see attorneys violate The Florida Bar's Professionalism Expectations as they pertain to communications by sending unprofessional emails without considering their content or the damage they might cause. I once received an email from an attorney that was clearly meant for another attorney in his firm, but had instead been mistakenly sent to me. In the email, the attorney was venting about my position on a legal issue in a case they had pending on appeal. The email said, and I quote, "This is exactly the kind of cat fight that I was trying to avoid by you talking to him. I picture him as a Norman Bates-type." Who the email was meant for is of no consequence. It should have never been sent to anyone.

The Florida Bar's Professionalism Expectations state that "[a] lawyer must avoid disparaging personal remarks or acrimony toward opposing parties, opposing counsel, third parties or the court" and "must not disparage another's character or competence."[9] In 2010, the Florida Supreme Court suspended an attorney for 10 days for several email exchanges in which the attorney made some very vicious attacks against opposing counsel's character, competence, and family.[10] In one email exchange, the attorney said, "While I am sorry to hear about your disabled child; that sort of thing is to be expected when a retard reproduces…Do not hate me,

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hate your genetics. However, I would look at the bright side, at least you definitely know the kid is yours."[11] Unfortunately, the opposing counsel waded into the muck, responding to one of the attorney's emails by stating, "I am sure your parents, if you even know who they are, are very proud of the development of their sperm cells…if you need to find the indications of 'retardism' you seek, I suggest that you look into a mirror, then look at your wife – she has to be a retard to marry such a loser like you."[12] The opposing counsel received a public reprimand for his part in the email exchanges.[13]

Such ugly email exchanges can be avoided if you always take a "time out" before sending an email in order to reflect on what you wrote and ask yourself if your words convey an attitude of professionalism. Think about how would you feel if the email was published on the front page of *The New York Times*, or read by your parents. By doing so, you might save yourself from the trouble and embarrassment caused by unprofessional communications. Remember, once you type an email and hit the "Send" button, it is no longer in your control and could wind up anywhere, even the world wide web. Furthermore, writing an email like the one quoted above could land you in front of the Florida Supreme Court facing disciplinary action. No matter what someone says to you or about you in an email (or any other oral or written communication), the best course of action is to always follow the sage advice of remaining silent if you cannot say anything nice.

Conclusion

The Florida Supreme Court said that "unacceptable professional conduct and behavior is often a matter of choice or decision-making."[14] Each day we practice law, we decide whether we will practice it in a professional manner. That decision can be difficult at times because, as Dale Carnegie pointed out, humans are creatures of emotion, not logic. Our natural instinct is to respond in kind when someone acts unprofessionally towards us. However, we need to repress that instinct and instead always be nice to others. By so doing we will better both our profession and ourselves.

***Richard J. Shoop** is the Agency Clerk for the Agency for Health Care Administration. He attended the University of Miami for both undergraduate studies and law school, obtaining a Bachelor of Arts in History with General Honors in 1996 and a Juris Doctor in 1999. He began his legal career at the Quincy office of Legal Services of North Florida, Inc. In 2001, Mr. Shoop went to work for the State of Florida, first with the Agency for Health Care Administration and then with the Department of Health as a prosecuting attorney for the Boards of Medicine, Osteopathic Medicine and Psychology. He accepted the position of Agency Clerk for the Agency for Health Care Administration in 2004. Mr. Shoop has been a member of the Administrative Law Section's executive council since 2009, and is currently serving as the immediate past chair. Please note that the opinions expressed in the article are those of Mr. Shoop, and not the Agency for Health Care Administration or the State of Florida.*

Endnotes:

1 See The Florida Bar's Oath of Admission that was revised September 12, 2011, to add the following: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."

2 See 5.1 and 5.2 of The Florida Bar's Professionalism Expectations; and R. Regulating Fla. Bar 3-4.3.

3 3.18 of The Florida Bar's Professionalism Expectations states that "[a] lawyer must not threaten opposing parties with sanctions, disciplinary complaints, criminal charges, or additional litigation to gain a tactical advantage. (See R. Regulating Fla. Bar 4-3.4(g) and (h))."

4 4.11 of The Florida Bar's Professionalism Expectations says that "[a] lawyer should stipulate to all facts and principles of law that are not in dispute and should promptly respond to requests for stipulations of fact or law."

5 The Florida Bar v. Norkin, 132 So. 3d 77, 92 (Fla. 2013).

6 Norkin, 132 So. 3d at 86.

7 See In re: Code for Resolving Unprofessional Conduct, 116 So. 3d 280 (Fla. 2013).

8 Norkin, 132 So. 3d at 92-93.

9 See 2.3 and 2.5 of The Florida Bar's Professionalism Expectations.

10 The Florida Bar v. Mitchell, 46 So. 3d 1003 (Fla. 2010).

11 See Exhibit C, page 1 of the Complaint in The Florida Bar v. Mitchell.

12 See Exhibit C, page 2 of the Complaint in The Florida Bar v. Mitchell.

13 See Florida Bar v. Mooney, 49 So. 3d 748 (Fla. 2010).

14 See In re: Code for Resolving Unprofessional Conduct, 116 So. 3d at 281.

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