ADMINISTRATIVE LAW SECTION NEWSLETTER

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In Case You Didn't See . . .

Licensing-Discipline

Mary Cluett v. Dept. of Professional Regulation, Florida Real Estate Commission
13 FLW 1727 (1st DCA, July 22, 1988)

The Florida Real Estate Commission fined and suspended an agent over the alleged unauthorized disbursement of monies from an escrow account to pay a mortgage. In its reversal, the 1st DCA concluded that the Real Estate Commission had abused its discretion in denying the agent's request for a new hearing on the grounds that a material prosecution witness had recanted her testimony and stated in an affidavit that she had consented to the agent's disbursement of monies to make mortgage payments.

Zoning

Battaglia Fruit Co. v. The City of Maitland
13 FLW 1733 (5th DCA, July 21, 1988)

The 5th DCA ruled that the circuit court departed from the essential requirements of law in not dismissing for lack of standing a petition for writ of certiorari where petitioner failed to present any evidence or objection in proceedings before county commission. The record before the Board of County Commissioners contains competent substantial evidence to support the county's rezoning action. The petitioner should not be permitted to present de novo evidence to the circuit court which had authority only to review what had been presented below.

Just the Facts, Ma'am

Clifford Berry & Betty Berry v. State of Florida, DER
13 FLW 1998 (4th DCA, August 31, 1988)

Fourth DCA reversed a final agency order denying a dredge and fill permit for property in Port Everglades, Florida, where findings of fact made by the hearing officer were rejected by the Secretary because the Secretary did not agree with them, although competent substantial evidence appeared in the record to support those findings.

Too Late

U.S. v. Holloway Oil Company
No. 88-59-Civ-J-14 (U.S. District Court, Middle District of Florida, July 26, 1988)

Company found liable for violations of Toxic Substances Control Act in default order issued by Environmental Protection Agency may not challenge bases for order in proceedings before federal district court without first exhausting administrative remedies. Moreover, the company could not raise as a defense that EPA had a duty under TSCA to seize or condemn the toxic substances.

Exemptions Nixed

Booker Creek Preservation, Inc. Manasota 88, Inc. and Sierra Club v. Southwest Florida Water Management District
13 FLW 2209 (5th DCA, September 22, 1988)

Fifth DCA found SWFWMD rule establishing exemptions to permitting criteria for isolated wetlands invalid because the exemptions ex-

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ceeded the statutory source upon which the rule was based and did not appear to be reasonably related to the purpose of the isolated wetlands statute. Consequently the exemptions were held to be arbitrary and capricious.

I Bid, You Bid, We Bid

Department of Transportation v. Groves-Watkins Constructors
10 FALR 4827 (S C., August 18, 1988)

Reversing a decision of the First District, reported as *Groves-Watkins Constructors v. Department of Transportation*, 511 So.2d 323 (1st DCA, June 11, 1987), the Supreme Court concluded that DOT had lawfully rejected all bids submitted on a project as too high and properly directed that the project be rebid. The high court's ruling was justified on the grounds that strong judicial deference should be accorded an agency's decision in competitive bidding situations, and that judicial intervention should occur only when the purpose or effect of the rejection was to defeat the object and integrity of competitive bidding.

Department of Professional Regulation v. Pedro F. Bernal, M.D.
13 FLW 603 (Fla., October 6, 1988)

In upholding the decision in *Bernal v. Department of Professional Regulation*, 517 So.2d 113 (3rd DCA, 1987), the Florida Supreme Court ruled that a district court can and should review the reasons asserted by an agency in modifying a hearing officer's recommended order; moreover, if the reasons for the change are legally insufficient, it is entirely appropriate to remand with instructions to approve the hearing officer's recommendations.

Florida Society of Opthamology and Florida Medical Association v. State of Florida, Department of Professional Regulation; State of Florida, Board of Optometry; Van B. Poole
13 FLW 2289 (1st DCA, October 6, 1988)

Plaintiffs/Appellants challenged the constitutionality of statute authorizing licensed, certified practitioners of optometry to administer and prescribe topical ocular pharmaceutical agents (eye drips) by bringing an action for declaratory judgment. The First DCA affirmed the dismissal of action because Plaintiffs/Appellants had failed to demonstrate a justifiable controversy arising from the application of the challenged act.

Mary Joyce Haynes v. Fred Carbonell
13 FLW 2322 (3rd DCA, October 11, 1988)

This case involved an ownership dispute over a fifty-foot strip of land along the Gulf of Mexico. The Third DCA concluded that where an ambiguity exists as to location of a property line, which ambiguity is caused by a conflict between a called natural boundary and conflicting called distance, the natural boundary supersedes as a matter of law. Furthermore, the failure to expressly convey riparian rights did not mandate finding that the grantor intended to reserve these rights.

Garcia-Allen/Turner v. State of Florida, Department of Transportation
13 FLW 2325 (1st DCA, October 13, 1988)

In a Per curiam opinion, the First DCA affirmed DOT's final decision to reject appellant's bid because of the refusal of the Federal Highway Authority to concur in DOT's opinion to award the bid to appellant. In reaching this decision, the First DCA found that there was no evidence of collusion or of an attempt to avoid competition, see *D.O.T. v. Groves-Watkins Constructors*, 13 FLW 462 (Fla., August 19, 1988).

Section's Midyear Meeting Schedule

Buena Vista Palace Walt Disney World Village Lake Buena Vista, Florida 32830-2206

Friday, January 13, 1989

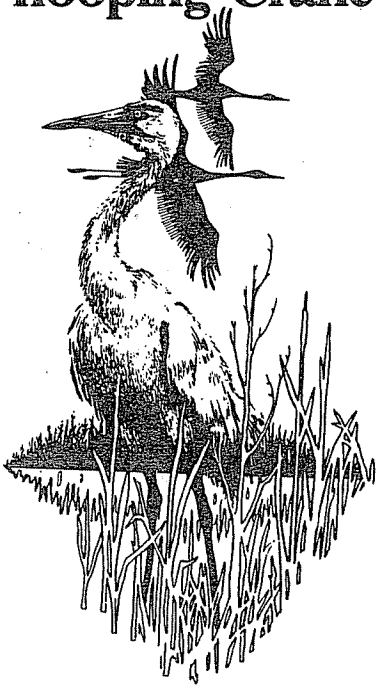
9:00 a.m.–10:00 a.m.- Long Range Planning Committee Meeting Suite 366
10:00 a.m.–12:00 p.m.- Executive Council Meeting Suite 366

Hotel Rate $99 single or double occupancy–Deadline date December 11, 1988 Reservations: (Group: The Florida Bar Midyear Meeting-B-047.04) Phone Number (407)827-2727.

To register for the Midyear Meeting, use the form found in the November 1 & 15 and December 1 & 15 issues of The Florida Bar News.

The Mating Dance of the Whooping Crane

by C. Gary Stephens, Editor



Nature photography has always amazed me, and that Sunday evening was no exception. You never knew how long the photographer must have sat there, waiting for those big birds to do their thing. The birds themselves could have been there hours, probably just talking, before one of them decided to put on a record to get things rolling. But there they were, each six feet tall with ten foot wingspans, high-stepping awkwardly first one way and then the other around a bundle of sticks that looked like a couple of weeks supply of kindling. The spastic steps to and fro around the circle were accompanied by equally ungainly flaps of the giant wings and intermittent raucous squawks of uncertain communicative content.

The narrator went on to explain how this dance was followed by the "mating process", presumably a euphemism for some equally awkward movements and noises, ultimately culminating in the deposit of an egg or eggs in the middle of this pile of sticks. "So that's how they did it," I thought, "No wonder the whooping crane's almost extinct."

The ritual aspects of the scene so patiently photographed were seldom more evident. A simple, primitive act, accomplished for the most part in nanno-seconds, required elaborate ceremonial embellishments to symbolize the importance of the occasion not only for these participants but for the body politic. It was life imitating religion.

I watched the big birds flap their wings a few more times and had the eerie sense that I had seen this all before. Having just returned from a negotiating session down at the local environmental agency, I was suddenly struck by the similarities in the ceremonial content of those otherwise ambiguous moves and gestures. In fact, the whole process there began to make sense, whooping crane-wise, with only a few other liturgical twists to reflect the unique bureaucratic habitat.

First, there was the processional. The parties of the first part would slowly assemble in the parking lot, armed with an arsenal of blue drawings and charts rolled up under their arms, with extra ammunition, all tabbed and organized, stashed away in leather designer briefcases. You could usually tell who the top guy was by who held the door open for whom in the processional toward the conference room. A lot of times you could just tell anyhow.

The conference room itself was decorated about like the rec room in a Baptist Church. The artwork was more likely some stream or marsh (occasionally just a giant map) rather than the Lord's Supper. Whatever. Usually no one from the agency would appear for approximately twelve minutes. Then, on cue, the high environmental priests in their ceremonial blue jeans would pop out of cubicles and stroll down dark hallways to take up liturgical positions around the sacred formica table. They were always careful to avoid revealing, by the slightest facial expression or gesture, whether they were in a mood to cut a deal that day or not.

At about this point, somebody would start the meeting. You could tell pretty much right away, what kind of meeting it was from who started the meeting and what deities they invoked. If it was basically an enforcement meeting and somebody was in deep trouble, one of the agency higher-ups would smile and say a few words about the importance of our drinking water supply to future generations. You knew right away this was going to cost you. You would then learn how remedial action and Chapter 11 would fit into your future.

The meeting would start, and proceed, differently if you had a thirty-day option on some hot coastal property and could make a killing only by getting a permit to build a roadway across a little soggy area on the backside of a barrier island. Here the spirit of reasonableness and expe-

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dited bureaucracy would be called forth. Without this roadway, your profit margin on each buildable lot — at least as you *initially* counted them — would be reduced so grossly that you'd have to turn in your car phone. But if you could get the roadway and arrange a few of the sand piles on the property, some call them "dunes," you could possibly keep your head above water. But time was of the essence here, and none of these people liked to be pressured. Obviously they had never done a real "deal."

Somehow the guy who started the meeting had to ask the agency to determine the application complete, proceed without the comments of the Federal Society for the Preservation of Coastal Dunes, issue a draft permit without notifying Ma and Pa Patishun who lived in an old house just across the marsh, and to waive the mandatory mitigation requirements for roadways. That person would start by smiling a lot, thanking everybody for being there, and complimenting everybody for the great work they were doing.

Somewhere along about the middle of this presentation, the agency people would jump up, still wearing their ceremonial blue jeans, and form a conga-like line around the table. Then, in practiced unison, they would begin an eerie *a capela* chant, which went sort of like "Humma jumma, jumma jumma jumma, jumma humma jumma." This would be repeated three times. They would then each bow toward one another and to their guests and return to their seats.

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

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What it meant was: "Oh honorable visiting dignitaries, we have heard and understood your true purposes here and feel obliged to note that we have taken some mild offense threat. We wish to advise that the application submitted by honorable visiting dignitaries is incomplete and may remain so until Hell freezes over. Moreover, honorable biologists have determined that God did not intend road to be in this particular area, otherwise would have constructed same. Finally, honorable visiting dignitaries, we have just shared with you honorable prayer to Spirit of Mitigation, which means that you will have to provide approximately one-half of Orange County, restored to its original swamp condition, as adequate mitigation for atrocity which honorable consultants have proposed."

At this stage in the ritual, there is a period best described as free-form, akin to the wing flapping of the cranes, during which certain individuals, not including the high priests of each side, may ventilate a bit. One snicker, one roll of the eyeballs upward, one file folder slammed to the sacred formica, and that's it. Either you have a deal or you don't. From there, it's all down hill, or perhaps outdoors. Hands are shaken all around, and an agreement to get back together and somebody will send somebody something confirming whatever.

The camera zoomed in on the two large speckled eggs cradled in the pile of kindling sticks as I watched with wonder. Amid all of the squawking and flapping of wings, I had not even seen the elemental acts which resulted in those eggs being there. At least I had seen nothing that looked like what I thought it ought to look like, if you know what I'm saying. Nonetheless, one of the whooping cranes awkwardly straddled the pile of sticks and settled down contentedly to provide warmth and nurture to the potential cranelets.

So there you have it: loud noises, jerky movements, flapping of wings, obligatory statements around the formica altar followed by smiles, chants and conga lines, all disguising a process not always seen with the naked eye, leading to the end product desired by all.

Now I feel better about people I take with me to these meetings. Back at the office, in our pre-meeting meeting, we can practice flapping our wings without going into a lot of the details. Likewise, I am able to clue them in so they're not too surprised when the witch doctors jump up and start to do the mitigation dance. "Relax," I say, "this is not gonna hurt for long. It's just part of the mating dance of the whooping crane."

Did You Know You Were Engaged in Alternative Dispute Resolution?

What some of you may not have known is that, whenever you prepare a complaint in circuit court or a petition for hearing in an administrative proceeding, you are laying the foundation for a dispute resolution process. Unless you or your client is the type of person who thrives on conflict, as I'm sure some are, you look for honorable ways to "resolve" the dispute, short of the massive labor (and expense) which often dwarf the problem itself. Those of you who have ever tried to "work things out" prior to litigation may well be part of a long lost tribe of alternative dispute resolution technicians. When you negotiate with the other side and try to persuade them, and your client, that something short of a nuclear attack may be in the interest of both sides, what you are doing, whether you know it or not, is practicing the evolving art of "getting to yes."[1] Now, when you hear people talk about separating the people from the problem, focusing on interest not positions, inventing options for mutual gain and insisting on using objective criteria, you will know that they drink from the fount of alternative dispute resolution and are adept at the art, imported from China in the late Forties, of negotiating agreement without giving in.

[1] "Getting to Yes: Negotiating Agreement Without Giving In" Fisher and Ury, 1981.

Superstars Highlight Sixth Administrative Law Conference

On September 9 and 10, 1988, Conference Chairman Steve Pfeiffer and a thousand friends of Florida Administrative Law convened the Sixth Annual Administrative Law Conference in Tallahassee.

England Recalls

The keynote speaker for the Friday session was Arthur J. England who, despite occasional other noteworthy accomplishments, including a tenure as Chief Justice of the Florida Supreme Court, is best known as the husband of Administrative Law Section Chairman, Deborah Miller. Word is that England's career had bottomed out and was heading nowhere until he met Deborah. In an earlier life, England had served as the author of the Reporter's Comments for the Florida Law Revision Council which reviewed, and proposed certain amendments to, the Administrative Procedure Act of 1961.

From that perspective, England described the major goals of the APA revision as seen by the Law Revision Council in 1973. These included: 1.) bringing the Administrative Procedure Act to all departments and agencies; 2.) establishing minimal due process for all departments and agencies; 3.) providing public access to administrative precedents and policies; 4.) expanding opportunities for flexibility and informality in agency decision making and, finally, 5.) clarifying the scope and role of judicial review. These goals, taken together, were intended to modify the administrative process considerably from those days where one was well advised to attend an administrative proceeding in the company of one's family, friends and, perhaps, a softball team, in the event the decisionmakers decided to take a vote.

Gellhorn Ruminates

Next in the parade of imminent jurists to the podium was Walter Gellhorn, Professor Emeritus at Columbia Law School and distinguished expert on the Federal Administrative Procedure Act. Gellhorn quickly established his expertise in the field by announcing that "the administrative process" was a figment of the imagination. He warned that in such discussions we should all guard against the temptation to identify similarities too quickly and to minimize obvious differences.

Calling for a new flexibility in exploring methods of developing underlying facts, Gellhorn noted that the world outside has much less confidence than we in the adversary process to get at the truth and that no single method always leads to sound results. He shocked the assembly by wondering aloud whether it was necessary for lawyers to be in on every decisionmaking proc-

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ess in our society. Alternative dispute resolution methods should be increasingly utilized, Gellhorn urged, and cheap and speedy resolution of matters given much higher priority in public administration. Gellhorn encouraged the architects of such new procedures to be free of nostalgia for a past that never was.

Bonfield Rules

Third in the triumvirate of Administrative Law heavyhitters was Professor Arthur E. Bonfield of the University of Iowa College of Law. Bonfield, the former chairman of the Administrative Law Section of the ABA, was critical of the latitude within federal agencies to make law by either rulemaking or adjudication and discouraged states from following in that tradition. He urged the view that "to the extent feasible and practicable, state agencies should be required to make law by rule." Bonfield noted that virtually every state now has a scheme for legislative or gubernatorial review of rulemaking and recommended that, where rulemaking is perceived as being unnecessarily overbroad, the law which results from case by case adjudication should be promptly incorporated into that agency's rulemaking, "subject to the rule of reason."

Day Two: C.O.N. Artists

The second day of the Administrative Law Conference opened with a spirited debate over state regulation of health care facilities, through the certificate of need (C.O.N.) program.

Kenneth D. Kranz, in support of the program, noted alarming increases in the cost of health care due to large capital expenditures to construct health care facilities even though the C.O.N. program keeps capital expenditures down by restricting unneeded facilities. Kranz suggested that without C.O.N regulation, paying patients would be siphoned off by competitors but not those unable to pay, thus undermining the financial integrity of institutions that provide indigent care.

French argued that changes in insurance and reimbursement programs have eliminated the argument that C.O.N. regulation keeps down the cost of health care. He noted that reimbursement for medical services is now based upon a set fee for a given procedure rather than upon an assessment of the provider's cost of providing the service. French also suggested that paying for indigent care through a de facto tax upon patients able to pay is inappropriate. He felt that indigent health care is an issue needing direct resolution rather than indirectly through an anti-competitive regulatory system.

At the conclusion of the debate, the audience expressed its view through an informal, show-of-hands vote. The response was evenly divided between those who favor continuation of the program and those who want to kill it.

Dempsey Declares

Bernard Dempsey, an Orlando trial attorney who specializes in complex litigation, made a presentation titled "Preparing and Presenting a Big Case." He has represented clients in proceedings before Hearing Officers of the Division of Administrative Hearings, but his practice has focused more upon jury trials in Federal District Court. His first observation was that preparing and presenting a case in an administrative proceeding involves the same techniques used in judicial trials. Dempsey emphasized the need to carefully organize documents for presentation into evidence, and the importance of maintaining close contact with witnesses, and, especially in the case of expert witnesses, the necessity to regularly communicate with them about the case.

Be Nice

The final presentation was a panel discussion dealing with the "free form agency process." The Moderator was Richard Donelan, from the Department of Environmental Regulation. Other agency representatives were Laurence Keesey, General Counsel to the Department of Community Affairs, and Cynthia Miller, who represents the Public Service Commission. Representing the private sector were Deborah Miller of Miami, Rhea Law of Tampa, and Philip Parsons of Tallahassee.

Agency representatives emphasized the need for candor on the part of attorneys in private practice, and opined that many administrative disputes could be resolved without formal hearing if the facts were discussed openly and compromise solutions seriously pursued. Private practitioners discussed the importance of thoroughly understanding the client's needs and all of the facts before approaching the agency. The possibility of resolving some matters through informal proceedings was also discussed.

Board of Governors Liaison Report

by Thomas M. Ervin, Jr.

I appreciate the opportunity to again report regarding Board of Governors issues and activities. First, however, congratulations to the Section and officers on yet another highly successful annual Administrative Law Conference in Tallahassee this past September.

A final report on The Florida Bar 1987-88 budget year is now possible. As Budget Committee Chairman for the past year, I am pleased to advise that the Bar ended the year with an operating surplus of slightly over $500,000. As we entered the budget year with a projected *deficit* of approximately $700,000, the surplus was quite an accomplishment and put to rest the threat of a Bar dues increase in the immediate future.

At the November meeting in Fort Lauderdale the Board will consider proposals for dramatic removal of confidentiality in the Bar discipline system. While the recommendations come from a distinguished study commission, I and many other Board members have strong reservations about the fairness of the proposals to wrongfully accused attorneys and whether the proposed revisions would truly serve the public interest. Your views on this subject are invited.

In September the Board of Governors revisited its position on IOTA. As you should be aware, The Florida Bar Foundation (a separate entity) has filed a petition seeking adoption by the Florida Supreme Court of "comprehensive" IOTA. In September the Board of Governors voted to support less-expansive "mandatory" IOTA, *with an opt-out privilege*. Thus, the Board's position would not force all lawyers into the IOTA plan, but would require an affirmative election to avoid participation. The matter now rests with the Florida Supreme Court.

The next midyear meeting of The Florida Bar is scheduled for January 11-14, 1989, in Orlando. This is a great opportunity for concentrated CLE (and credits). The 1988 midyear meeting was the most successful ever, and we expect this one to be even better. Early registration is strongly recommended.

Thanks again for the opportunity to submit this brief report, and for the privilege of serving as your Board Liaison for four years.

Thomas M. Ervin, Jr., has served on the Board of Governors since 1983, and as Board Liaison to the Administrative Law Section since 1985. He is a candidate for 1989-90 President-elect of The Florida Bar. He received his B.S. in 1963 from Florida State University and his J.D. from the University of Florida in 1967. He is a partner in the Tallahassee law firm of Ervin, Varn, Jacobs, Odom & Kitchen.

"This is a night for white wine."

NEWYORKER '83

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

Administrative Law Overview Seminar

ONE LOCATION: January 20, 1989, Econo Lodge East, Tallahassee

COURSE CLASSIFICATION: INTERMEDIATE

LECTURE PROGRAM

8:25 a.m.- 8:30 a.m.	**Opening Remarks** *William L. Hyde, Chairman, Administrative Law Section CLE Committee*
8:30 a.m.- 9:15 a.m.	**Practice and Procedure Before the Department of Community Affairs** *Paul Bradshaw, Director, Division of Resource Planning & Management, Department of Community Affairs, Tallahassee, Florida*
9:15 a.m.-10:00 a.m.	**Evidentiary Considerations in Section 120.57 Proceedings** *Michael J. Cherniga, Esquire, Roberts, Baggett, LaFace & Richard, P.A., Tallahassee, Florida*
10:00 a.m.-11:00 a.m.	**Practice and Procedure Before the Department of Health and Rehabilitative Services** • General Agency Overview: *John Miller, Esquire, General Counsel, Department of Health and Rehabilitative Services, Tallahassee, Florida* • Certificate of Need Review: *Theodore Mack, Esquire, Assistant General Counsel, Department of Health and Rehabilitative Services, Tallahassee, Florida*
11:00 a.m.-11:15 a.m.	**Coffee Break**
11:15 a.m.-12:00 p.m.	**Practice and Procedure Before the Department of Environmental Regulation** *Vivian Garfein, Esquire, Assistant General Counsel, Department of Environmental Regulation, Tallahassee, Florida*
12:00 p.m.-12:45 p.m.	**Effective Representation Before the Board of Medicine** *Jonathan King, Esquire, Assistant General Counsel, Department of Professional Regulation, Tallahassee, Florida*

CLER CREDIT

(Maximum: 5 hours)
General: 5 hours Ethics: 0 hours

DESIGNATION CREDIT

(Maximum: 5 hours)

Admin. & Governmental Law	5.0 hours	Environmental Law	2.5 hours
Appellate Practice	2.5 hours	General Practice	5.0 hours
Corporation & Business Law	2.5 hours	Trial Practice—General	2.5 hours

CERTIFICATION CREDIT

(Maximum: 3.5 hours)

Civil Trial . . . . . 3.5 hours

Policy does not permit double credit within any one of the credit programs listed above. Any combination of the hours indicated may be used providing the total does not exceed the maximum for the course or the total for the area. EACH LAWYER SHOULD MAINTAIN A RECORD OF CREDIT HOURS EARNED.

NOTE: This course has been awarded credit for recertification by the U.S. District Court for the Northern District of Florida. This course will offer a maximum of 2.5 hours credit of the required eight (8) hours necessary for recertification under Local rule 4-5(C)(1)(b).

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____ COURSE MATERIALS ONLY. Cost: $15.90

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Register me for Administrative Law Overview Seminar
(89) Tallahassee (1/20/89)

NAME _____ ATTORNEY NO. _____

ADDRESS _____

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( ) Member of the Administrative Law Section of The Florida Bar: $60

( ) Member of The Florida Bar but not of the Administrative Law Section, or applicant for The Florida Bar exam: $70

( ) Full-time member of a law college faculty or a full-time law student working toward a Juris Doctor degree: $35

THE SURCHARGE FOR NONSECTION MEMBERS REVERTS TO THE COSPONSORING SECTION.

REGISTRATION AND REFUND POLICY

Registration is by check only. Cash will not be accepted at the course presentation or through the mail. All requests for refunds less a $10 cancellation fee will be honored if postmarked within forty-eight (48) hours after the last course presentation. No refunds will be given after that time. We regret that your registration fee is not transferable to other CLE courses, however, you may attend any location of the course for which you have registered. LATE REGISTRATION ON THE DAY OF THE COURSE WILL REQUIRE AN ADDITIONAL $10.

PLEASE NOTE: Pre-registration is advised as there is a maximum number of seats available for this program. Please do not assume space availability if you plan to register at the door.

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