# Administrative Law Section Newsletter

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## From the Chair

**by Mary F. Smallwood**

Although it hardly seems possible, this will be my last column as Chair of the Administrative Law Section. On June 22, 2001, I will turn over those responsibilities to David Watkins, our Chair-elect. The past year has been delightful and rewarding, primarily because I have had the opportunity to work with some of the most dedicated members of the Florida Bar. The officers of the Section and the many people who have served as Committee Chairs have contributed countless hours of their time to the Section for the benefit of all of our members and others with an interest in Florida administrative law issues. Their help and counsel have been invaluable to me. It is only appropriate, then, to recognize those individuals.

Perhaps the best place to start is with Elizabeth McArthur who has, for several years now, served as the editor for this newsletter. Soliciting interesting and original articles, working with authors in editing them, and enforcing publication deadlines tend to be thankless jobs for any editor. On top of that, she occasionally fields irate comments from readers who may take exception to an article in the newsletter, incorrectly considering it to represent a Section position. In her own gentle way, Elizabeth has kept us all on schedule and produced a product that we can all be proud of. I know she would want me to take this opportunity to ask for assistance from all of you in keeping that tradition going. Articles on timely topics are always welcome!

Likewise, the Section can be very proud of its Administrative Practice Manual. It is a resource that I use frequently, as I am sure many of you do. Keeping that Manual updated and useful is an ongoing task. Linda Rigot does a yeoman's job in this respect. Obviously, a big thank you must go out also to all of the authors who work so hard in updating their articles every year.

Bobby Downie has done an excellent job in soliciting and editing articles for The Florida Bar Journal. We are generally successful in filling all our slots in the Journal, and the articles are of the highest quality. This

*continued, page 2*

## "Dark Fiber" Enters the Controversy: Parties Fail to Reach Accord

**by Joe Allan McGlothlin**

Breaking through pavement to place infrastructure is expensive. When a telecommunications company lays fiber optic cable, it places many more fibers than are needed immediately, thereby avoiding or postponing the expense of excavating a second time when more fiber cable capacity is needed. To activate the unused ("dark") fibers, the company has only to place electronics at each end of the dark fiber.

In the case of *MCI Telecomms. Corp. v. BellSouth Telecomms, Inc*, 112 F. Supp. 2d 1286 (N.D. Fla. 2000), the United States District Court for the Northern District of Florida was called upon by party litigants MCI and BellSouth to consider the nature of the dark fiber in BellSouth's network. The case involved MCI's claim that it was entitled, under applicable law, to lease a portion of BellSouth's dark fiber and use it to serve its own customers. In support of its claim, MCI asserted that dark fiber is the equivalent of installed plant that is ready for service — much like a switch that, though in operation, has unused,

*continued, page 2*

**INSIDE:**

## FROM THE CHAIR

*from page 1*

last year, the Section put together a special edition of the Journal that was devoted to administrative law issues. I especially want to thank Linda Rigot, Bill Williams, Ralph DeMeo and Charlie Stampelos for that excellent work on that project. Complimentary copies of the Journal were provided to members of the Legislature and legislative committee staff directors. I have personally received many favorable comments on that edition of the Journal and its value to the readers.

Linda Rigot and Bill Williams for several years now have worked diligently during the legislative session keeping track of all bills that might affect the Administrative Procedure Act or the administrative process. This year, Bill and Linda were joined by Curt Kiser. This effort is extremely time-consuming during the course of the session. Every year there are numerous bills that most of us are unfamiliar with that will potentially have a significant effect. The Section's Legislative Committee reads and analyzes all of these bills, works with legislative and agency staff, meets with individual Legislators and, when necessary, appears before legislative committees. Occasionally, the messengers get blamed for the news when a particular bill appears to be inconsistent with a legislative position adopted by the Section. However, our committee members try very hard to work with all interested parties to achieve a resolution of any such conflicts.

My thanks to Ralph DeMeo for serving as Chair of the CLE Committee this year. While we did not plan to have the Pat Dore Conference this year, Ralph has worked with many others in a planning effort for the future and in putting together the Journal special edition.

Dave Watkins and Donna Blanton are to be congratulated for planning and organizing an excellent long-range planning retreat for the Executive Council. The opportunity to get away for an entire day and talk about large scale issues was very helpful. At this retreat, the Executive Council considered and adopted modifications to its By-Laws and the Section's legislative positions.

Debby Kearney has worked hard this year on the Section's law school writing contest and law school liaison. Debby's efforts are just one of the many examples of the Section's attempts to reach out to communities beyond the administrative law practitioners. The law schools are an important part of that outreach.

Joe McGlothlin has chaired the small but important Public Utilities Committee this year. We appreciate his efforts and those of other public utility attorneys in their educational efforts.

And last, but definitely not least, I want to thank Jackie Werndli, the Section's liaison at The Florida Bar. Jackie cheerfully puts up with our eccentricities and personality quirks. She answers all of our questions quickly and competently. She runs interference for us with the Bar. Most important of all, she keeps us organized. Jackie, we couldn't do it without you. Nor would we want to. Thanks.

## "DARK FIBER"

*from page 1*

available switching capacity. Resisting MCI's claim, BellSouth argued that dark fiber is instead a form of spare inventory — analogous to a spool of cable stored in a warehouse.

Was MCI's vision of employing BellSouth's dark fiber an optical illusion? Or did the court see BellSouth's position as an unjustified, last ditch effort to keep others from gaining access to its fiber network?

"You have unearthed an interesting case, Joe," you are saying, "but enlighten us as to why a case before a federal district court is being discussed in an article about administrative law."

I conduit. In fact, you have brought me to the principal subject of this article. The dispute between MCI and BellSouth did not arrive at the federal court in the form of an antitrust claim or a diversity breach of contract case. Instead, MCI and BellSouth were invoking a federal statute that provides for judicial review by a federal district court of certain decisions of the Florida Public Service Commission. This unusual (and, as the Commission has demonstrated during the case, controversial) statutory path from the state administrative agency to the door of the federal courthouse exemplifies the complexity of the interface between federal and state jurisdictions when utility-related matters of administrative law are involved, and illustrates the myriad of issues — many having constitutional dimensions — that arise when they rub together. The case also involves Congress' initiative to wrest

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from another federal district court the role of formulating national telecommunications policy.

Some quick, abbreviated background is in order. In relatively recent times, the telecommunications industry has undergone significant structural changes. Many readers will remember when the entire industry was an end-to-end monopoly. Within the overall monopolistic regime, AT&T's "long-lines department" served the long distance market; AT&T's operating companies and a number of smaller independent companies held exclusive monopolies throughout the local exchange market. However, in the 1970's competition began making inroads in the industry, and — fueled by litigation — reached and penetrated the long distance market. During the years immediately prior to 1996, the long distance telecommunications market was characterized by numerous, competing providers. The local exchange industry continued to be served by companies that held exclusive monopolies in their respective service areas; however, beginning in the mid-1980's, none of the providers of local exchange service were affiliated any longer with AT&T.

The absence of AT&T affiliates from the local exchange portion of the industry structure was the result of the Modified Final Judgment ("MFJ") entered by U.S. District Court Judge Harold Greene in *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982).

The resolution of an antitrust suit initiated against AT&T by the Department of Justice, the MFJ required AT&T to divest its local exchange businesses, which were consolidated into seven unaffiliated regional companies (the RBOCs, or "baby Bells").

While the divestiture requirements and line-of-business restrictions of the MFJ were extraordinary, the MFJ was actually designed to strengthen and enforce the industry paradigm that was in place at the time. That paradigm delineated sharply between the competitive long distance market and the local monopoly franchise. Under the MFJ, long distance companies still could not provide local service; importantly, the RBOCs were constrained by the terms of the MFJ from entering the long distance market. As he oversaw the implementation and occasional modification of the MFJ, Judge Greene was the chief architect of national telecommunications policy for more than a decade.

More recently, policymakers have challenged the proposition — accepted and perpetuated in the MFJ — that the local exchange is a natural monopoly. In Florida, changes to Chapter 364, Florida Statutes, designed to enable competition in the local exchange were enacted in 1995. Congress embraced the revised thinking and established it as national policy when it passed the Telecommunications Act of 1996.

The policy vision underlying the 1996 Telecommunications Act is a telecommunications industry in which all providers of service ultimately will be free to enter and compete in all markets. The 1996 Act imposes on all incumbent local exchange companies ("ILECs") the obligation to interconnect with new entrants in the local exchange market. Further, to jumpstart competition in the local markets, under the law an incumbent must agree to provide services to the new entrant ("alternative local exchange company", or ALEC) that the ALEC can resell to end use customers. Alternatively, the new entrant may lease certain portions of the ILEC's network (that meet the criteria of the 1996 Act) for use in providing services of its own.

An RBOC that can demonstrate that it has opened its network to competitors in compliance with the Act (as measured by evidence of the presence of competition and a 14 point statutory "competitive checklist") may apply to the FCC for authority to enter the long distance market from which it was excluded by Judge Greene's MFJ. The 1996 Act calls for the FCC to consult with the state utility commission and with the Attorney General before ruling on an application by an RBOC.

This sequence — i.e., the opening of the incumbent's local network, followed by an application to enter the long distance market in that state — is purposeful. If an RBOC were allowed to provide long distance service before the framework for competition (including the nondiscriminatory access to the incumbent's network mandated by the Act) has been established in its local exchange service area, the RBOC would be the only provider in a position to offer all services. The condition precedent, then, is needed to prevent the 1996 Act — the intent of which was to foster competition in all markets — from having the unintended effect of enabling the remonopolization of both the local and the long distance markets.

Associated with the broad parameters of the 1996 Act are a myriad of issues that must be resolved by the administrative agencies to which the 1996 Act assigns the job of implementing its provisions. To what extent must an incumbent "unbundle" its network into separate components ("elements") for a new entrant? What limitations attend the right of the new entrant to place its facilities ("collocate") on the premises of the incumbent to accomplish the interconnection mandated by the 1996 Act? What prices must the new entrant pay to the incumbent for services or facilities? How is the requirement of the 1996 Act that an incumbent offer a quality of service to ALECs that is at least equal to that which it provides to its own retail customers to be applied and enforced? And, more to the point of this article, what happens when an incumbent and an ALEC cannot agree to the terms of a contractual interconnection arrangement? These questions and others have generated a flood of activity before the Federal Communications Commission and state administrative agencies, including the Florida Public Service Commission. The agencies' decisions have resulted in a corresponding level of appellate litigation.

Turning to the provisions affecting judicial review, the Act requires an incumbent to negotiate with a new entrant the terms of an "interconnection agreement." This contract will govern the facilities the ILEC will make available to the ALEC and the prices that the ALEC will pay for those facilities. If the parties fail to agree to terms, either party may ask the state regulatory agency to arbitrate the issues between them. If the state agency refuses or fails to arbitrate the differences, the Act calls for the FCC to perform that function. Judicial review of the state agency's arbitration decision is provided for in 47 U.S.C. Section 252(e)(6), which states:

*continued...*

**"DARK FIBER"**
*from page 3*

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal District court to determine whether the agreement or statement meets the requirements of section 251 and this section.

When negotiating with BellSouth the terms of an interconnection agreement, MCI asked BellSouth to (among other things) include dark fiber as an "unbundled network element." BellSouth refused. MCI asked the Florida Public Service Commission to arbitrate the issue. The Commission conducted proceedings and determined, *inter alia*, that dark fiber is not among the "network elements" that the Act requires the incumbents to make available to new entrants on an unbundled basis. Invoking the above section, MCI filed a "complaint" in which it asked the district court to conclude that the resulting contract did not conform to the requirements of the 1996 Act. MCI raised the dark fiber subject and separate issues; BellSouth identified others in a "counterclaim."

The Florida Public Service Commission moved to dismiss the case on the grounds that the suit was prohibited by the Eleventh Amendment to the United States Constitution. The court denied the motion to dismiss and proceeded to consider the merits. BellSouth and the Commission then appealed aspects of the court's decisions to the United States Court of Appeals for the Eleventh Circuit. The appeals are pending.

47 U.S.C. Section 252(e)(6), the section of the 1996 Act that governs judicial review, contains literally no guidance with respect to either the procedure the district court is to follow or the standard of review it is to employ. The district court was called upon to consider, not only the jurisdictional argument raised by the Commission, but the most basic questions regarding the manner in which it should proceed under the statute. Consistent with the decisions of numerous other district courts that had considered the question, early in the case the parties agreed — and the court ruled — that the court should consider the record that was developed before the Commission, as briefed and argued in "appellate fashion" by the parties.

Among the subjects that the parties briefed was the appropriate standard of the court's review. The court concluded that its review would be *de novo* with respect to the legal interpretation of the provisions of the Act, but that it should apply a liberal "arbitrary and capricious" standard to any treatment given by the Commission that did not interfere with the court's legal interpretation. *MCI, supra*, at 129.

With respect to the Commission's claim of Eleventh Amendment immunity, the court focused on the issue of the applicability of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *Ex parte Young* holds that, notwithstanding the Eleventh Amendment, state officers acting in their official capacity are not immune from a suit in federal court seeking *prospective* injunctive or declaratory relief from violations of federal law. In its ruling on the motion to dismiss, the court rejected the Commission's contention that the remedy sought by MCI was limited to correcting past mistakes, rather than being prospective in nature. The court also ruled that the holding of *Seminole Tribe v. Florida*, 517 U.S. 44, 134 L.Ed.2d 252; 116 S.Ct. 1114 (1996), did not render *Ex parte Young* inapplicable under the circumstances. *Seminole* holds that, where the remedies of the subject statute are inconsistent with the injunctive and declaratory remedies contemplated by the doctrine, the statutory remedial scheme evinces an intent not to provide for an action against the state, and *Ex parte Young* will have no application. The court stated, "That (Seminole) holding affects the case at bar not at all; here MCI seeks not to pursue a remedy different from the one Congress provided, but instead to pursue precisely the remedy Congress provided in clear and unmistakable language." *MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 1997 U.S. Dist. LEXIS 23883.

In concluding that the doctrine of *Ex parte Young* is applicable under the circumstances, the district court reached the same result as most of the federal appellate courts that have considered the question. *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862 (6th Cir. 2000) *cert. denied*, 148 L.Ed.2d 22 (U.S. 2000); *MCI Telecomms. Corp. v. U.S. West Comm., Inc.*, 216 F.3d 929 (10th Cir. 2000) *cert. denied*, 148 L.Ed.2d 1026 (U.S. 2001); *MCI Telecomms. Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323 (7th Cir. 1999), *cert. denied*, *PSC v. Wisconsin Bell, Inc.*, and *Illinois Commerce Comm'n v. MCI Telecomms. Corp.*, 121 S.Ct. 896 (2001). However, the Eleventh Circuit has not ruled on the question; in the context of a challenge to the manner in which a state agency interpreted a previously approved interconnection agreement, the Fourth Circuit concluded that *Ex parte Young* was inapplicable. *Bell Atlantic MD, Inc. v.* MCI WorldCom, 240 F.3d 279 (4th Cir. 2001), pet. for cert. filed April 5, 2001.

While not the basis for the district court's ruling, the issue of a potential waiver of immunity from suit is also caught up in the Commission's Eleventh Amendment argument. Such a waiver may be explicit or constructive in nature. With respect to the question of an explicit waiver, the issue in this case necessarily will involve an analysis of the interplay of Section 768.28(17), Florida Statutes, which states that any waiver of Eleventh Amendment immunity must be ". . .explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court. . .", with the following language of Section 120.80(13)(d) and (e), Florida Statutes, which was enacted in 1996:

> (d) Notwithstanding the provisions of this chapter, in implementing the Telecommunications Act of 1996, . . .the Public Service Commission is authorized to employ procedures consistent with that Act.
>
> (e) Notwithstanding the provisions of this chapter, Section 350.128, or Section 364.381, appellate jurisdiction for Public Service Commission decisions that implement the Telecommunications Act of 1996,. . .shall be consistent with the provisions of that Act.

Do these provisions address only the need to mesh procedural matters

when the Commission is involved in the implementation of the 1996 Act, or did the Legislature also intend by this provision to submit to suit in federal court? If the latter, does the language of the statute contain the requisite degree of specificity set forth in Section 768.28, F.S.?

The decision of the United States Supreme Court in *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 119 S. Ct. 2219 (1999), had the effect of sharply limiting the possibility of "constructive" waivers of Eleventh Amendment immunity. Still, case law establishes that such a waiver may be found when under federal law the equivalent of a "gratuity" is offered to the state and an agreement to be sued in federal court is a condition of the acceptance of the gratuity. Obviously, the regulation of the provision of local exchange services is an area in which the states traditionally have been active; just as obviously, the 1996 Act affected the relationship of state and federal roles in the area. When approving an interconnection agreement or arbitrating a dispute over the terms of such an agreement, then, does the state agency continue to exercise its sovereign powers, such that no federal "gratuity" (and no waiver of immunity from suit) should be found? Or is the "invitation" of the 1996 Act an opportunity to participate voluntarily in an otherwise off-limits federal regime — a "gratuity" in return for which a waiver of Eleventh Amendment immunity can be exacted? Several circuit courts have characterized the approval and arbitration of interconnection agreements pursuant to the 1996 Act as areas of federal activity in which, but for the decision to participate voluntarily in the program set out in the Act, the state would otherwise have no role. They have concluded that the state agency's voluntary agreement to participate constitutes a constructive waiver of the Eleventh Amendment immunity from suit in federal court. *MCI Telecomms. Corp. v. Illinois Bell, supra,* at 344; *MCI v. PSC,* 216 F.3d 929 (10th Cir. 2000) *cert. denied*, 148 L.Ed.2d 1026, 121 S. Ct. 1167 (2001); *AT&T Comms. v. BellSouth,* 238 F.3d 636 (5th Cir. 2001). As is the case with the application of *Ex parte Young* under these circumstances, the Eleventh Circuit has not ruled on the issue, and examples of a contrary view appear in the case law. *Michigan Bell Tel. Co., supra, Bell Atlantic MD, Inc. v. MCI Worldcom, supra.*[1]

You ask, unwaveringly, "What about the dark fiber?" Despite its darkness, the convoluted history of the unused fiber optic cable issue is reflective of many other issues associated with the 1996 Act. 47 U.S.C. Section 251(d)(2) states that an ILEC must unbundle an element and provide it to the ALEC if the element is either "necessary" (in the case of proprietary elements) or if its unavailability would "impair" the ability of the ALEC to provide the services it seeks to offer. Early in the implementation of the Act, the FCC adopted a liberal application of the scope of the "necessary" and "impair" standards. However, it refused at the time to rule on the question of whether dark fiber is an "unbundled network element," leaving the issue to the states (by virtue of an FCC rule that provides to states a qualified ability to add to the FCC's list of unbundled network elements) to decide the question in individual arbitrations. Not surprisingly, the states went in different directions. The Florida Commission's determination that dark fiber is not an unbundled network element placed it in the minority.

In the meantime, the FCC's view of the "necessary" and "impair" standards reached the United States Supreme Court. In *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), the Court ruled that the Commission had failed to support the interpretation of the "necessary" and "impair" standards that it had incorporated in its rule, and it remanded the case to the FCC.

On remand, the FCC altered its stance. It ruled, *inter alia*, that dark fiber is a network element that must be provided to ALECs on an unbundled basis. The FCC issued its ruling on dark fiber during the remand proceeding before the district court rendered its opinion in the *MCI* case that is the subject of this article.

In its opinion on the merits, the court agreed with the FCC's reasoning and ruled that dark fiber is a "network element". *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 112 F. Supp. 2d 1286, 1290 (N.D. Fla. 2000). The pending appeals of the district court's order do not encompass this ruling. However, several ILECs recently filed a joint petition with the FCC in which they ask the FCC to, among other things, remove dark fiber from its "national list" of unbundled network elements.

The treatment of dark fiber is only one of the many issues that have been generated by the 1996 Act. This "fiber evidence" may help explain why, five years after the 1996 Act was passed, many of the issues regarding its interpretation and implementation have yet to be finally resolved.

**Endnotes:**

[1] The difference in context is significant. In a separate holding, the court concluded that 47 U.S.C. Section 252(d)(6) applies only to the review of (1) the approval or rejection of an interconnection agreement and (2) the arbitration of disputes arising in the formation of an agreement. The court concluded it had no jurisdication under either this section or the "general federal question" statute to review a decision involving the interpretation of an agreement that had been approved previously. Id. at 304-305. The issue of whether the federal courts have jurisdiction under the 1996 Act to review decisions of state agencies that interpret or enforce interconnection agreements is a separate area of dispute. Id. at 306.

*A shareholder in the firm of McWhirter Reeves,* ***Joe McGlothlin*** *is a graduate of Davidson College and of the FSU College of Law. He is a former Director of the Legal Department of the Florida Public Service Commission. Focusing on the areas of energy and telecommunications, he practices administrative law (and, after hours, his vintage trumpets) in Tallahassee.*

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# APPELLATE CASE NOTES

by Mary F. Smallwood

## Rulemaking

*Board of Podiatric Medicine v. Florida Medical Association*, 26 Fla. L. Weekly 797 (Fla. 1st DCA 2001)

The Florida Medical Association challenged a proposed rule of the Board which defined "human leg" and "surgical treatment." The term human leg was defined to include the entire leg below the hip. It defined surgical treatment to mean "a distinctly operative kind of treatment." The administrative law judge concluded that the definition expanded the legislative scope of practice of podiatric medicine by covering the leg above the knee.

On appeal, the court reversed. It held that the Board did not enlarge, modify, or contravene the statute. The statute defined the practice of podiatric medicine to mean "diagnosis, surgical, palliative, and mechanical treatment of ailments of the human foot and leg." The court noted that expert testimony at the hearing supported a conclusion that the term leg had various meanings, some of which could be limited to portions of the leg below the knee, and so it deferred to the agency's broad discretion in construing the statute.

## Bid Protests

*Department of Lottery v. Gtech Corporation*, 26 Fla. L. Weekly 621 (Fla. 1st DCA 2001)

The Department had previously decided to award a contract for provision of on-line lottery services to a competitor of Gtech, Automated Wagering International, Inc. (AWI). A prior appeal from a bid protest filed by Gtech was resolved in favor of the Department and AWI. Subsequently, those parties entered into contract negotiations that resulted in execution of an agreement between the Department and AWI. Gtech filed an action in circuit court seeking a declaratory judgment that the RFP did not allow for material changes in AWI's proposal.

Both sides agreed that there were no material issues of fact and sought summary judgment. Accordingly, the actual factual differences between the original AWI proposal and the subsequent contract were not at issue. Instead, the determination of the court revolved around an interpretation of Provision 8.7.2 of the RFP. That provision stated that the Secretary could negotiate a contract with the "most highly qualified respondent" if he determined that the proposal was the "best method of obtaining the desired" services.

The court concluded that AWI's proposal could not be deemed the "best method" since the terms of the contract were materially different than the AWI proposal. It rejected the Department's argument that it was no longer bound by the requirements of Chapter 287, Fla. Stat., once it had found AWI to be the preferred provider. It also rejected AWI's argument that the material changes should be allowed because of the elapse of time between the submittal of proposals and the negotiation of the contract. AWI contended that failure to recognize the impact of such delays would encourage unsuccessful bidders to file challenges for purposes of delay. In this case, the court noted that Gtech had been at least partially successful in the prior challenge and that none of its allegations were completely without merit. The majority concluded that the appropriate resolution by the Department would have been to reject both proposals when it became apparent that the passage of time had changed the circumstances to the extent that the proposals provided the best method of meeting the Department's requirements.

Judge Kahn dissented. He was persuaded by the fact that the provision of the RFP contemplated a possible failure of negotiations with the first bidder resulting in negotiations with the next responsive bidder. He opined that there would not be a failure of negotiations unless material provisions of the proposal, such as price, were at issue in the contract negotiations.

Finally, the majority opinion notes, in dicta, that the matter should have been resolved in an administrative proceeding under Chapter 120, Fla. Stat. However, since no party raised an objection to the declaratory judgment proceeding on the grounds of failure to exhaust administrative remedies, it concluded that that issue had been waived.

## Licensing

*Chancellor Media Whiteco Outdoor v. Department of Transportation*, 26 Fla. L. Weekly 627 (Fla. 5th DCA 2001)

Several billboard companies appealed a final order of the Department of Transportation (DOT) concluding that the appellants had violated federal law by reerecting billboards that had been destroyed or damaged by wildfires. On appeal, the billboard companies argued, *inter alia*, that the Administrative Law Judge (ALJ) had applied an incorrect burden of proof, that the ALJ erred in holding that federal law preempted a state law allowing reerection of the billboards, and that the ALJ erred in determining that the signs had been destroyed by an act of God rather than a tortious act.

While the ALJ did not specify the burden of proof applied in the proceeding, the parties agreed that it had been a preponderance of the evidence test. The court agreed with appellants that the appropriate burden was clear and convincing. The court equated the revocation of the billboard permit to a revocation of a professional license, noting that both result in a loss of income. It concluded that the revocation of a billboard permit is penal in nature.

Secondly, the court agreed with the appellants that the federal law did not preempt the state from adopting the Wildfire Act allowing billboards and other nonconforming structures damaged by wildfires to be reerected. The federal regulation relied upon by DOT provided that a state could permit reerection of a billboard destroyed by "vandalism and other criminal or tortious acts." DOT argued that the state could not authorize reerection under any other circumstances.

However, the court held that the federal regulation did not expressly *prohibit* states from adopting exemptions other than the three identified in the federal rule.

Finally, the court reversed DOT's final order to the extent that it held that the billboards were destroyed by an act of God rather than a tortious act. All parties agreed that the wildfires were started by lightning strikes. However, the appellants argued that the actual destruction of the billboards was a result of the tortious failure of the Division of Forestry to protect their property. The court agreed. It held that the Division breached a statutory duty it owed the public to protect private property, citing Section 590.01, Fla. Stat. That section simply provides that the division has the "primary responsibility for prevention, detection and suppression of wildfires." Since Black's Law Dictionary defines a tort to include a "breach of duty," the court concluded the Division acted tortiously in failing to prevent the damage. Interestingly, there was no discussion by the court of the potential implication of finding the state to have acted tortiously.

*Deep Lagoon Boat Club, Ltd. v. Sheridan*, 26 Fla. L. Weekly 562 (Fla. 2d DCA 2001)

Deep Lagoon Boat Club applied to DEP for an ERP permit to expand an existing marina. DEP had previously issued a permit for the same project, but that permit expired without the work being done. Sheridan, a neighbor, challenged DEP's decision to issue the permit. At the administrative hearing, Deep Lagoon argued that Sheridan was estopped from arguing that the permit should be denied due to unacceptable secondary impacts as she had challenged the expired permit on the same grounds and lost. Sheridan argued that the regulatory requirements governing secondary impacts had been modified since the first permit was issued; and, thus, res judicata did not apply. The administrative law judge ruled in favor of Sheridan on that issue, finding that the amendments to the law constituted changed conditions. Deep Lagoon filed exceptions to the recommended order challenging the administrative law judge's conclusion of law on the issue of res judicata. In its final order, DEP held that it had no authority to modify or reject the administrative law judge's conclusion of law as it was not within the agency's substantive jurisdiction.

On appeal, the court affirmed. Citing Section 120.57(1)(l), Fla. Stat., as amended in 1999, the court held that a determination of the applicability of collateral estoppel or res judicata is a matter to be resolved by a judicial or quasi-judicial officer, not the agency.

## Adjudicatory Proceedings

*McIntyre v. Seminole County School Board*, 26 Fla. L. Weekly 707 (Fla. 5th DCA 2001)

McIntyre, a transportation manager for the school board, was notified that he was to be suspended without pay because of a positive drug test. The letter from the board stated that he could request a administrative hearing pursuant to Section 120.57, Fla. Stat., within 21 days of receipt of notice. McIntyre submitted a timely letter to the board indicating he wished to present evidence to the board challenging the drug test and that he did not want to be suspended without pay. The board suspended him without pay at its next meeting, and McIntyre filed a petition for hearing. That petition was denied as untimely.

On appeal, the court reversed and remanded. It held that the board acted in violation of Section 120.569(2)(c), Fla. Stat., which specifies the required contents of a petition and provides that a petitioner must be allowed at least one opportunity to amend a deficient petition. While McIntyre's first letter did not actually request a hearing, the court found that it met substantially of the other requirements of Section 120.569(2)(c). The letter raised disputed issues of fact with respect to the validity of the drug test. Accordingly, the petition for hearing should have been treated as a timely amendment of the first letter.

## Declaratory Statements

*Florida Power Corporation v. Garcia*, 26 Fla. L. Weekly 102 (Fla. 2001)

Florida Power Corporation ("FPC") filed a request for a declaratory statement with the PSC requesting that the PSC construe a prior order and one of its rules with respect to payments under a negotiated contract with a qualifying facility providing power to FPC. The PSC dismissed the request, holding that it was precluded from considering the issue on the grounds of administrative res judicata. The PSC concluded that it was bound by its decision four years earlier to dismiss a substantively identical request for a declaratory statement from the same company. In the first case, the PSC had determined that it did not have subject matter jurisdiction because FPC was actually requesting that the PSC resolve a contract dispute between itself and the qualifying facility rather than interpret a provision of law. That dismissal was not appealed by FPC.

The Court agreed. It held that, within the narrow circumstances of this case, the PSC was precluded from entertaining the second request for a declaratory statement because its prior dismissal, whether erroneous or not, acts as a bar to considering the second request.

## Exhaustion of Administrative Remedies

*Department of Agriculture v. Sun Gardens Citrus, LLP*, 26 Fla. L. Weekly 360 (Fla. 2d DCA 2001)

The Department issued an immediate final order (IFO) requiring the destruction of certain citrus trees infected with citrus canker. Sun Gardens, a lessee of property where the trees were located, sought injunctive relief in circuit court to prevent the Department from acting on the IFO, arguing that it was a "property owner" for purposes of receiving notice of the Department's intended action. The circuit court entered a temporary injunction.

On appeal, the Department argued that its interpretation of its own rule defining a property owner should be given great weight and that Sun Gardens had failed to exhaust administrative remedies.

The court, citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, concluded that the Department's interpretation must be upheld. The court noted that the statutory provisions under which the Department was acting did not contain any provisions for notice to

*continued...*

**APPELLATE CASE NOTES**
*from page 7*

property owners or others. Accordingly, the question became whether the Department's rules with respect to notice were reasonable. The Department's interpretation of the rule requiring notice to property owners could permissibly be construed to apply to individuals or entities holding title to the real property. Whether it would be more reasonable to interpret the rule to require notice to the owner of the crops is irrelevant.

The court also agreed with the Department that the appropriate forum for obtaining relief from the IFO would have been the appellate court pursuant to Section 120.68, Fla. Stat. It rejected Sun Gardens' position that Section 120.73, Fla. Stat., allowed it file the circuit court action, noting that the appellee had not sought a declaratory judgment under Chapter 86, Fla. Stat.

*Department of Children and Families v. Jackson*, 26 Fla. L. Weekly 746 (Fla. 2d DCA 2001)

Jackson and others challenged their pre-commitment detention at the Department's South Bay facility. The detainees had been determined to be sexually violent predators under the Jimmy Ryce Act, which allows involuntary commitment of such persons after they have served their criminal sentence. Section 394.915 requires detainees to be kept in "an appropriate secure facility." During their commitment proceedings, the detainees requested transfer to a different facility, arguing that the South Bay facility was essentially a penal institution. The trial judge ordered the transfer.

On appeal, the Department argued that the respondents had failed to exhaust their administrative remedies to challenge whether the South Bay facility was an appropriate secure facility. The court, however, found that there was no adequate administrative process available to the respondents. It noted that the Department had the statutory authority to adopt rules for the designation of appropriate facilities but had failed to do so. Accordingly, the court held that the trial judge could determine whether a facility was an appropriate secure facility within the context of the commitment hearing. However, the court remanded the case to the trial court, finding that the judge had failed to hold an evidentiary hearing to make such a determination.

## Primary Jurisdiction Doctrine

*Flo-Sun, Inc. v. Kirk*, 26 Fla. L. Weekly 189 (Fla. 2001)

Former Governor Kirk and others brought suit against a number of sugar cane companies (the "industry") pursuant to Chapter 823, Florida Statutes, alleging that the industry had created and maintained a public nuisance that caused pollution, injured wildlife and resulted in public injury. The complaint further alleged that the governmental agencies had aided and abetted in such public nuisance by failing to enforce applicable laws and providing direct and indirect subsidies to the industry.

The trial court dismissed the complaint, holding that the provisions of Chapter 403, Florida Statutes, had impliedly superseded the public nuisance provisions of Chapter 823 and that the doctrine of primary jurisdiction barred the suit. On appeal, the Fourth District reversed. It rejected the trial court's determination that Chapter 823 had been superseded. With respect to the argument that the doctrine of primary jurisdiction barred the suit, the court remanded the matter to the trial court, holding that the allegations in the complaint that the administrative agencies' failure to act was egregious and devastating must be overcome in an evidentiary hearing.

The Supreme Court affirmed in part and reversed in part. With respect to the effect of Chapter 403 on Chapter 823, the Supreme Court held that the public nuisance provision of Chapter 823 had not been superseded by the adoption of specific environmental remedies in Chapter 403. In doing so, the Court resolved a conflict between the district courts on that issue. The Court noted that Section 403.191, specifically provides that the remedies in that chapter are cumulative and not exclusive. The Court also noted the difference in the burden of proof under the two statutory provisions. An activity may constitute a nuisance even though it is in compliance with applicable environmental regulations. Finally, the Court noted that the Right to Farm Act, which protects farmers from nuisance suits under certain circumstances, was adopted 10 years after Chapter 403. It found that fact convincing evidence that the Legislature anticipated that agricultural activities would still be subject to nuisance suits.

With respect to the doctrine of primary jurisdiction, the Court reversed. While accepting the allegations in the complaint as true, the Court held that the plaintiffs had failed to allege that the APA did not provide a remedy. The burden to demonstrate that the doctrine did not apply was on the party seeking to bypass the administrative process. The Court declined to follow *State ex rel. Shevin v. Tampa Electric Co.*, 291 So. 2d 45 (Fla. 2d DCA 1974), which had allowed the attorney general to file a nuisance suit, noting that that case had been decided prior to the adoption of the "modern APA." Under present day law, the APA subjects every agency action to scrutiny. The Court noted that persons could challenge agency decisions, participate in and even initiate rulemaking, seek declaratory statements, and appeal agency decisions.

## Judicial Review

*Ludwig v. Department of Health*, 26 Fla. L. Weekly 673 (Fla. 1st DCA 2001)

Ludwig, a licensed clinical social worker, sought a stay of an order suspending his license. The court issued the stay and entered an opinion to explain the process to be followed under amended Fla. R. App. P. 9.190. Specifically, the court noted that a stay is not automatic and the licensee must file an appropriate motion with the court. Rule 9.190 allow the agency 10 days to respond to demonstrate that a stay would result in a probable danger to the public health, safety, or welfare. If no response is filed, the stay must be granted. The licensee may also request that the 10 day response period be shortened. Finally, the court noted that, while the Rule does not establish a mechanism for the licensee to reply to an agency objection to a stay, due pro-

cess considerations require that the opportunity for such a reply be granted.

### Notice of Agency Action

*Bay Village of Sarasota, Inc. v. Department of Community Affairs*, 26 Fla. L. Weekly 685 (Fla. 2d DCA 2001)

DCA issued a final order fining Bay Village for failure to pay annual registration fees for a storage tank between 1988 and 1997. The order also imposed a $15,000 penalty for late payment. DCA had previously sent notice of the fees and penalty to the company, but Bay Village argued on appeal that the notice was defective. The provisions of the statute provide that no late fee may be assessed if the fees are paid within 30 days of receipt of notice. In this case, the notices from DCA were sent certified mail to the corporate registered agent but addressed to the corporate headquarters. The final order was sent to officers of the company at its corporate address.

The court reversed the final order with respect to the late fees. It held that sending notice to the registered agent at the wrong address was not reasonable notice. It noted that the return receipt on the prior notices did not indicate that any officer or director of the corporation ever received the notices until the final order was issued.

### Attorney's Fees

*Department of Children and Family Services v. D.H.*, 26 Fla. L. Weekly 954 (Fla. 1st DCA 2001)

D.H. was awarded attorney's fees and costs by the administrative law judge pursuant to Sections 120.569(2)(c) and 120.595(1), Fla. Stat., for bringing a frivolous and improper action against D.H. The Department reversed that award. On appeal, the Department acknowledged that it had no authority to reverse an administrative law judge's determination that the action was frivolous or for an improper purpose. However, it maintained that the reversal was solely for the purpose of preserving its right to appeal the award. The Department further argued that the award was improper as an abuse of discretion.

The court reversed the order of the Department. It held that the agency had no authority to overturn the administrative law judge's decision. Moreover, it noted that the standard of review of an administrative law judge's decision on the award of attorney's fees is an abuse of discretion. Finding nothing in the record to indicate such an abuse, the court upheld the award.

*Kelley v. Public Employees Relation Commission*, 26 Fla. L. Weekly 980 (Fla. 5th DCA 2001)

Kelley had appealed to PERC a decision of the Florida Fish and Wildlife Conservation Commission to terminate her employment. Of the five charges against her, she prevailed on one and partially prevailed on another. PERC then found that she should be demoted rather than terminated. Kelley sought attorney's fees as the prevailing party, and PERC denied that request.

On appeal, the court affirmed the denial of the award of attorney's fees. The court found that PERC had properly exercised its discretion in denying the request by considering all relevant factors. The court noted that Kelley had not prevailed on all counts, and that the discipline was reduced only because Kelley had been a good employee during her period of employment and a lesser punishment had been imposed on another employee under similar circumstances.

***Mary F. Smallwood*** *is a partner with the firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in its Tallahassee office. She is Chair of the Administrative Law Section of The Florida Bar and a Past Chair of the Environmental and Land Use Law Section. She practices in the areas of environmental, land use, and administrative law. Comments and questions may be submitted to MFS@Ruden.com.*

## Administrative Law Section Executive Council Special Meeting of the Administrative Law Section January 16, 2001 Minutes

I. Call to Order

Mary Smallwood called the meeting to order at 8:50 a.m.

Executive Council Members Present: Mary Smallwood, Dave Watkins, Li Nelson, Donna Blanton, Ralph DeMeo, Clark Jennings, Paul Rowell, Chris Moore, Charlie Stampelos, Bill Williams, Linda Rigot, Debby Kearney, Seann Frazier, Patrick Imhof, Clark Jennings, Allen Grossman, Scott Boyd,

Executive Council Members Absent: Dan R. Stengle, Bobby Downie, M. Catherine Lannon, Elizabeth McArthur

Others present: Jackie Werndli, Section Administrator; Keith Hetrick, Mary Ellen Clark, Bruce Conroy, Pam Leslie, Jonathan Davidson, Ben Girtman, Andy Bertron, Curt Kiser, Bruce Culpepper, Michelle Oxman

Mary explained that the meeting had two purposes: 1) to consider the Section's legislative proposals; and 2) to consider the Section's budget.

I. Legislative positions:

Mary explained the Section's reason for considering changes to the Section's legislative positions and summarized the Executive Council's previous discussion of the legislative positions, which were addressed at length during the Council's fall retreat. Mary also introduced Bill Williams, Linda Rigot and Curt Kiser as members of the Executive Council's legislative committee and explained the role they perform during session.

A. Rulemaking

The following position, previously approved for distribution purposes, was discussed :

> Opposes any amendment to Chapter 120, Florida Statutes, or other legislation, which undermines rulemaking requirements of the Administrative Procedure Act by allowing statements of agency policy without formal rulemaking.

Mary explained that the proposed language was to delete superfluous language. Bill Williams explained the history behind the previous language.

Bill Hetrick asked why use of "statements of agency policy" language was being used; Mary Ellen Clark inquired whether agency handbooks would fall under the position. Bill Williams opined that handbooks have always been included if they fall within the definition of a rule, which is where the "statements of agency policy" language is derived.

Bruce Conroy (DOT) noted that this position addresses requirements, but asked whether the section needed a position regarding what standards apply. Mary reiterated the need to have legislative positions that the section, public and private lawyers alike, could feel comfortable with. Allen Grossman observed that the position does not make any effort to address the issue regarding standards, but is broad enough for the Section to get involved, if necessary. Linda Rigot stated that this position focuses on bills that would allow passage of rules without agencies going through the rulemaking process. Bruce stated that he thinks the statement may broaden the statutory directive. Linda stated that the Council did not intend to get into that particular issue, and listed Department of Revenue as an example of an agency being given authority to issue "guidelines." Bill Williams also offered the Building Code legislation as an example that would be addressed by this position.

A grammatical correction was offered, and consensus reached that the position should read as follows:

> Opposes any amendment to Chapter 120, Florida Statutes, or other legislation that undermines the rulemaking requirements of the Administrative Procedures Act by allowing statements of agency policy without formal rulemaking.

B. Points of Entry: The following position, which was previously approved by the Council for distribution to the membership, was discussed:

Opposes any amendment to Chapter 120, Florida Statutes, or other legislation, to deny, limit, or restrict points of entry to administrative proceedings where rights of substantially affected persons are involved.

Mary explained the existing position and that the changes were meant to make this position consistent with the position on rulemaking. Bill William's explained that the proposed changes were considered in light of legislation presented during the previous legislative session. When the changes were discussed at the retreat, there was no discussion of the different standing issues presented by section 403.412(5): the section has never taken a position with respect to that section, and if we want to stay away from that issue, perhaps the wording should be addressed.

Mary read a portion of a letter received from Frank Matthews, which is attached to the minutes, and invited people who practice outside the environmental arena to offer comments.

Michelle Oxman works for the Agency for Health Care Administration with the Statewide Provider and Assistance Panel. She stated that the Panel is currently exempt from Chapter 120 and is concerned about the effect that the amendment would have on amendments to Chapter 408. Bill Williams explained that the position would not affect existing provisions and explained the goal / process used for consulting on legislation. Pam Leslie (General Counsel, DOT) stated that she would be concerned should the Section move into the 403.412 debate. Larry Sellers expressed the same concern and suggested that the language "limit or restrict" points of entry be confined to "by persons whose rights are substantially affected." Pam Leslie expressed support for this language.

> Keith Hetrick raised a provision presented during last year's session regarding tightened time frames for summary proceedings and how that would be affected by this position. Bill Williams stated that this position only deals with your right to participate, not what happens once you do. Keith presented the possibility of an attorney's fees amendment and asked whether it would be considered as affecting a point of entry because of its possible "chilling effect." Bill thought not, as attorneys fees are at the end the proceeding as opposed to the beginning.
>
> Keith also asked about pre-APA proceedings, where conditions were placed on a point of entry. Mary said without the Council seeing a particular piece of legislation, it is difficult to know how these positions will affect them. As bill arise, the Council and legislative committee would welcome input.
>
> Keith stated he was nervous about the Section getting involved in substantive debates and how words "limit or restrict" could be interpreted. Linda Rigot stated that the positions are written broadly because we don't know what will come up and must be broad in order to comply with the Florida Bar's legislative proposal requirements. Bill Williams said that interpretation is always a matter of degree. The broadness gives the committee ability to respond to legislative staff. The major policy the Section is concerned with is meaningful access to agency decisionmaking.

A consensus was reached for the following language:

> Opposes any amendment to Chapter 120, Florida Statutes, or other legislation, to deny, limit, or restrict points of entry to administrative proceedings under Chapter 120, Florida Statutes, by substantially affected persons.

C. Exceptions or Exemptions: The following position, which was previously approved by the Council for distribution to the membership, was discussed:

Opposes exemptions or exceptions to the Administrative Procedures Act, but otherwise supports a requirement that any exemption or exception be included within Chapter 120, Florida Statutes.

Mary explained that the proposed changes were intended to clean up the language of the existing position and presented no real substantive change. No further comments or suggestions were offered.

D. Mediation: The following position, which was previously approved by the Council for distribution to the membership, was discussed:

Supports voluntary use of mediation to resolve matters in administrative proceedings and supports confidentiality of discussions in mediation, but opposes mandatory mediation and opposes imposition of penalties associated with mediation.

Mary explained that this position, along with the following position, were new for the Section. John Davidson explained that the Consortium had worked with three pilot agencies (DOT, PSC, DOI) on mediation issues and were fine with the recommendation, but would like to encourage mediation. Perhaps more active language would be preferable to the current statutory provision. Mr. Davidson also provided the website for the Consortium (consensus.fsu.edu).

Allen Grossman asked about the "penalties associated with mediation" provision. Mary explained that a bill last year had included an "offer of judgment" provision, whereby if a party did not receive as much at hearing as was offered at mediation, then that party would be required to pay attorneys fees for the entire hearing. Allen suggested that the language as proposed could affect individual

mediations, especially in the professional licensing arena. Mary Ellen Clark agreed. Ben Girtman suggested that the position be amended to read "imposition of involuntary penalties. He also asked about confidentiality of documents presented during mediation. Bill Williams explained that the position was limited based upon the public records law.

Consensus was reached upon the following language:

> Supports voluntary use of mediation to resolve matters in administrative proceedings under Chapter 120, Florida Statutes, and supports confidentiality of discussions in mediation; but, opposes mandatory mediation and opposes imposition of involuntary penalties associated with mediation.

E. Uniformity of Procedures: The following position, which was previously approved by the Council for distribution to the membership, was discussed:

> Supports uniformity of procedures in administrative proceedings and supports modification of such procedures only through amendment of the Uniform Rules of Procedure.

Bill Williams proposed that the position be amended to add "or exceptions to." Larry Sellers asked about the motivation for this position. Curt Kiser stated that the position sets a policy on uniformity among agencies in dealing with the public and with actions under the Act. Keith Hetrick gave hypotheticals such as DOR and the Building Code Commission and asked how this position would affect them. Bill Williams stated that the position is aimed at uniformity of agency process during the APA process, not during free-form agency action pre-APA. Allen proposed the addition of proceedings...."under Chapter 120, Florida Statutes" to address this issue.

A consensus was reached regarding the following language:

> Supports uniformity of procedures in administrative proceedings under Chapter 120, Florida Statutes, and supports modification of such procedures only through amendment of or exceptions to the Uniform Rules of Procedure.

Thereafter, the meeting of the Section was adjourned and the meeting of the Executive Council called to order. Attendance of the council members was as listed above.

I. Adoption of legislative positions:

Debby Kearney moved that the legislation position on rulemaking, as stated below, be adopted as a legislative position of the Section:

> Opposes any amendment to Chapter 120, Florida Statutes, or other legislation that undermines the rulemaking requirements of the Administrative Procedures Act by allowing statements of agency policy without formal rulemaking.

Linda Rigot seconded the motion, which passed unanimously.

Donna Blanton moved that the legislative position on points of entry, as stated below, be adopted as a legislative position of the Section:

> Opposes any amendment to Chapter 120, Florida Statutes, or other legislation, to deny, limit, or restrict points of entry to administrative proceedings under Chapter 120, Florida Statutes, by substantially affected persons.

Clark Jennings seconded the motion, which passed unanimously.

Li Nelson moved that the legislative position on exceptions or exemptions, as stated below, be adopted as a legislative position of the Section.

> Opposes exemptions or exceptions to the Administrative Procedures Act, but otherwise supports a requirement that any exemption or exception be included within Chapter 120, Florida Statutes.

Clark Jennings seconded the motion, which passed unanimously.

Clark Jennings moved that the legislative position on mediation as stated below, be adopted as a legislative position of the Section:

> Supports voluntary use of mediation to resolve matters in administrative proceedings under Chapter 120, Florida Statutes, and supports confidentiality of discussions in mediation; but, opposes mandatory mediation and opposes imposition of involuntary penalties associated with mediation.

Donna Blanton seconded the motion, which was approved unanimously.

Li Nelson moved that the legislative position on uniformity of procedures as stated below, be adopted as a legislative position of the Section:

> Supports uniformity of procedures in administrative proceedings under Chapter 120, Florida Statutes, and supports modification of such procedures only through amendment of or exceptions to the Uniform Rules of Procedure.

Clark Jennings seconded the motion, and discussion ensued regarding whether we the Section was clear that this did not apply to free form agency action. With that understanding, the position was adopted unanimously.

II. The Budget

Jackie Werndli explained the budget proposal, a copy of which had been provided to Section members. Ralph asked about sponsorship and possible use of sponsors for seminars. Jackie explained that they were discouraged, but could possibly be used with respect to conferences such as the Pat Dore Conference. Ralph suggested that perhaps the Section could consider an out-of-town seminar in conjunction with the retreat and if so, would we need to address that possibility in the budget. Jackie thought not.

There was some discussion regarding the attendance and revenue at the last Pat Dore conference, and the pitfalls of planning a conference during session. Thereafter, Linda Rigot moved that the budget be adopted and Bill Williams seconded the motion, which passed unanimously.

For everyone's information, Ralph stated that the section was trying to schedule a seminar after session (June 8). Mary Ellen Clark announced that the Tallahassee Women Lawyers were having a CLE program May 21 and invited everyone to attend.

The next meeting of the Council will be at the Bar meeting in June.

III. Adjournment: It was moved and seconded and unanimously agreed that we adjourn at approximately 11:30 a.m.

**Administrative Law Section Members:**

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How can we improve? What would you like to see in your newsletter that you do not see now?

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Listed below is the information you need to contact your section officers or your newsletter editor.

Please let us hear from you!

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