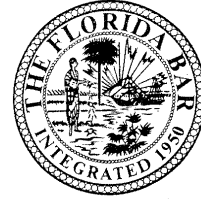


# ADMINISTRATIVE LAW SECTION NEWSLETTER



Vol. X, No. 1

THE FLORIDA BAR

August 1988

## Chairman's Message



Welcome to the 1988-89 year of the Administrative Law Section. As your new Chairman, I'm looking forward to a productive and challenging year. Officers elected at the annual meeting were: Chairman-elect — Ms. Drucilla E. Bell; Secretary — Mr. Patrick Maroney; Treasurer — Mr. William Hyde. Our Board of Governor's Liaison this year is again Mr. Tom M. Ervin, Jr.

The Executive Council has four new members, each of whom has much to offer the Section because of their background and experience. Stephen Maher, is a professor of administrative law at the University of Miami's School of Law. Betty J. Steffens, formerly general counsel for Governor Bob Graham, is now a Tallahassee private practitioner. Vivian Garfein is senior attorney with the Florida Department of Environmental Regulation in Tallahassee. Terry Rigsby, formerly acting general counsel and director of banking at the Department of Banking and Finance, is now in private practice in Tallahassee.

The next Executive Council meeting will begin at 3:30 p.m. on Thursday, September 8, in Tallahassee.

The Administrative Law Conference, which has been a huge success under the leadership of its founder, Judge Robert Smith, is scheduled for September 9-10 in Tallahassee. Steve Pfeiffer, this year's chairman, has recruited some outstanding speakers. These include Professor Walter Gellhorn, the author of the Federal Administrative Procedure Act; Arthur J. England, Jr., the author of Florida's Administrative Procedure Act; and Professor Arthur Bonfield, chairman of the ABA's Administrative Law Section and noted author in the field of state administrative law.

The Administrative Law Conference's larger goals are to address where the administrative process has succeeded and failed and to propose means of improving the process. Practical sessions will include an update on current trends in administrative law, a presentation on how to prepare a "big" case for hearing, and a panel discussion on how to deal effectively with agencies from the private practice perspective and how to deal effectively with the private sector from the agency perspective.

The major Section goal in strengthening our *Newsletter* is to keep Section members informed of Section Committee activities. In the next *Newsletter*, each Committee chairman will report to you his Committee's activities. You are encouraged to contact the chairmen of the committees in which you have an interest to share your ideas with them and become involved. Following my message is a list of the Section's Committees chairmen for your information.

I look forward to keeping you informed of our Section activities in future *Newsletters* and invite you to contact me about any thoughts you may have about our Section.

— Deborah J. Miller

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# Board of Governors Liaison Report

by Thomas M. Ervin, Jr.



As I write, the Board of Governors of The Florida Bar has just completed its first meeting of the 1988-89 Bar year. With an expanded fifty-member Board, and twenty-two brand new members, the year promises to be interesting.

Turning first to old business, it now appears certain that the projected Bar deficit for 1987-88 has been avoided, and Bar operations for the year should be over \$400,000 "in the black". As I have commented earlier, the sections deserve much of the credit for this success. As 1987-88 Budget Chairman, I extend my thanks and that of the full Board.

This is, indeed, a dynamic time for The Florida Bar and our profession. There are, at this time, separate commissions studying: (1) professionalism, (2) advertising and solicitation, (3) the disciplinary system, (4) bar legislative policy, and (5) gender bias. Each of these represents a *serious* effort to thoroughly study the indicated area; and return with concrete proposals for change and improvement.

At the same time, the concept of a General Assembly, or like device, to increase the participation and voice of Sections, voluntary bars, and individual lawyers of like views, is gaining momentum. In many of the areas the Board must address we will never achieve unanimous agreement, and unanimity simply can't be an organizational precedent to action. We can, how-

ever, increase the opportunity for all segments of our membership to be heard, and heard fully, before important decisions effecting our profession are made.

There is a broader role in this process for the sections. Many sections view their Bar input as necessarily restricted to a narrow field, and choose not to speak to broader issues. The Board of Governors, however, often must address issues which cut across many legal disciplines and impact the public's perception of the legal system, and our profession generally.

I urge the Administrative Law Section, and all sections, to broaden "Bar input" sights. I suggest that sections can better serve the interests of section members and our profession in general by seeking out the section membership views on a broader range of Bar issues and policies, and conveying those views to the Board of Governors.

Thanks to the Section for the opportunity to present this brief report, and for the privilege of serving as your Board of Governors Liaison for four consecutive years.

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*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 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.*

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## Roen Exhorts Lawyers to Transcend Jabberwocky



Lawyers attending the Joint Luncheon sponsored by the Environmental, Administrative Law and Local Government Law sections were rewarded by the candid remarks of Nancy Roen, General Counsel to the General Development Corporation and Chairman of the South Florida Water Management District. Alluding to Dickens' *Age of Foolishness* and *Winter of Despair*, Roen wondered

aloud whether the governmental decisionmaking process she saw offered any prospect at all of resolving major environmental and governmental problems staring Florida in the face today. Characterizing much of what she hears as "jabberwocky", Roen exhorted lawyers and consultants of good will to improve the quality of decisionmaking by demanding excellence of public servants and being willing to pay for competent and well-trained staff for public agencies. Her remarks were appreciated and well-received by the combined assembly.

# What is Administrative Law Anyhow?

The Administrative Law Section of The Florida Bar has the primary objective of "fostering and promoting interest in the field of administrative law, whatever that is determined to be." It is obviously a phrase conceived in a bygone era when bank charters and liquor licenses were the only real fodder of administrative debate. In the twilight of the eighties, however, those of us who are not surrounded by government, *are* government, and, wherever there is government, there is administration, and where there is administration, there is administrative law. Neither the Reagan initiative to get government off the back of the citizens nor the government effort to get special interests off the back of government nor the citizens' effort to keep government and special interests from getting too cozy has been particularly successful. Consequently, we find ourselves in an ongoing, multifaceted, many-played dispute resolution seminar. We are, in a word, knee-deep in administrative law.

Given this new and heightened emphasis on regulatory conflicts, governmental prerogatives, and multiple interest group intervention, what role can administrative lawyers in general play and how can the Administrative Law Section in particular provide leadership and support in developing those skills? These questions are ones for lawyers/managers, for bar executives and for the participants in any process where governmental interests are introduced.

Should the Administrative Law Section move aggressively into the fields of federal administrative law, of mediation and dispute resolution, of local government appeals procedures, of family conflict mediation, of people's court? Should the tenets of administrative law be allowed to reach out into the provinces away from the rolling hills of Tallahassee? To the pristine waters of Biscayne Bay? To the sinkholes of Central Florida or the pecan groves of the Panhandle? Can administrative law travel that far and still retain its bite? As a native Tallahasseean, the prospect of all the administrative lawyers leaving town every now and again sounds generally good for the neighborhood.

What's at issue, of course, is the agenda and scope of responsibilities for The Florida Bar Administrative Law Section. Your suggestions in this regard are welcome not only by the Long Range Planning Committee (described elsewhere herein) but also by the Executive Council of the Section. You may direct any suggestions or comments to those groups directly or by for-

warding same to the Newsletter, which will sort the wheat from the chaff and give consideration to publishing same. Maybe we should come up with a bumper sticker: HAVE YOU HUGGED YOUR ADMINISTRATIVE LAWYER TODAY?

— The Editor



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*Gary Stephens, a graduate of Duke University and the FSU College of Law, maintains a private practice in Tampa in the fields of Environmental, Land Use, and Administrative Law. A former DER attorney, Stephens also serves on the executive council of the Florida Bar Administrative Law section and frequently lectures or writes in the area of environmental dispute resolution.*

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

Deborah J. Miller ..... Chairman  
*Miami*

Drucilla E. Bell ..... Chairman-elect  
*Tallahassee*

Patrick F. Maroney ..... Secretary  
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C. Gary Stephens ..... Editor  
*Tallahassee*

Fay Yenyo ..... Section Coordinator  
*Tallahassee*

Statements or expressions of opinion or comments appearing herein are those of the editors and contributors and not of The Florida Bar or the Section.

# In Case You Didn't See:

## Enforcing Terms of Settlement

*Singer Island Civic Association, Inc. v. Casetta*, 13 FLW 1410 (4th DCA, June 15, 1988)

Civic association entered into agreement with condominium developer to dismiss with prejudice a pending request for administrative hearing in return for developer's modification of application and letter of credit to be escrowed for payment of specific items. The Fourth DCA concluded that the escrow agent acted properly in delivering the letters of credit to the civic association when developer failed to perform in accordance with the agreement.

## Judicial Review

*City of West Palm Beach Zoning Board of Appeals and the City of West Palm Beach v. Education Development Center, Inc.*, 13 FLW 1412 (4th DCA, June 15, 1988)

Fourth DCA quashed the Order issued by the Circuit Court which reversed the decision of a municipal zoning board which had denied an application to convert property located in a residentially zoned area to a preschool on the grounds that the circuit court had exceeded its permitted scope of review by substituting its judgment for that of the board by either reinterpreting inferences which evidence supported or reweighing that evidence.

## Exemptions

*Gulf Coast Home Health Services of Florida, Inc. v. Department of Health and Rehabilitative Services*, 13 FLW 1367 (1st DCA, June 8, 1988)

The First DCA affirmed two HRS final orders concluding that a grandfathered home health agency could not open subunits without a certificate of need review because the subunits themselves are the equivalent of home health agencies and do not meet the exemption requirements for the grandfather clause contained in Section 400.504, Florida Statutes (1985).

## Standards

*Joseph M. Paisley v. Department of Insurance*, 13 FLW 1256 (1st DCA, May 25, 1988)

First DCA affirmed the final order of the Department of Insurance revoking appellant's insurance agent's license by construing the

statutory language of Section 626.61(7), Florida Statutes, which authorizes the revocation for "demonstrated lack of fitness or untrustworthiness . . ." to encompass convictions of crimes in federal court.

## The Right Time, The Right Place

*Beverly Enterprises et al. v. HRS*, 10 FALR 2701, 13 FLW 1066 (1st DCA, May 4, 1988)

Appellants contend that the order denying their CON applications violates the principles enunciated in *Gulf Court*. Nevertheless, the 1st DCA affirmed the order saying the appellants should have raised the possible violations by direct challenge in each proceeding rather than pursuing an independent action to create additional bed need where none exists.

*Costain Florida, Inc. v. Metropolitan Dade County, Gabriel Soloman and Lewis Yagodnik*, 13 FLW 1413 (3rd DCA, June 14, 1988) Petitioner sought abatement of circuit court proceedings pending consideration by Florida Land and Water Adjudicatory Commission (FLAWAC), of development application denials. Third DCA found that under the circumstances jurisdiction lay within the province of both the circuit court and FLAWAC and denied the petition.

## Evidence

*Department of Highway Safety and Motor Vehicles v. Steven A. Corbin*, 13 FLW 1442 (1st DCA, June 17, 1988)

The First DCA affirmed the order of the Public Employees Relation Commission (PERC) that the "accident report privilege" section, 316.966 Florida Statutes (1986 Supp.), barred the use of a highway patrol trooper's report of his own accident against him in disciplinary proceedings.

## Municipal Corporations/Preemption

*Orange West, Ltd. v. City of Winter Garden, Florida*, 13 FLW 1609 (5th DCA, July 7, 1988)

Appellant wanted to convert a mobile home park from rental park to condominium and contended that certain municipal subdivision ordinances were not applicable because they are preempted by the state condominium statutes, which argument the 5th DCA found to be without merit.

## Permitting Procedure

*C. E. Middlebrooks d/b/a Wekiva Falls Resort v. St. Johns River Water Management District*, 13 FLW 1608 (5th DCA, July 7, 1988)

Appellant unsuccessfully argued that the St. Johns River Water Management District lacked jurisdiction to enter its final order because he withdrew his consumptive use permit application after receiving the hearing officer's recommended order but before the District acted on it.

## Bidding/Agency Discretion

*Hewitt Contracting Company, Inc. v. Melbourne Regional Airport Authority*, 13 FLW 1653 (5th DCA, July 14, 1988)

Airport Authority has the discretion to waive the irregularity of a bid delivered ten minutes after the closing time announced in advertisement of bids but before the bids were opened.

## Compare:

*Northrop and Northrop Building Partnership v. State Department of Corrections*, 13 FLW 1681 (1st DCA, July 19, 1988)

Agency's notifying unsuccessful bidder by telephone that its bid had been rejected without informing bidder that failure to file protest within time prescribed in statute constituted waiver of proceedings under APA does not comply with statutory notice requirements, and the bidder's subsequent delay in filing written protest did not constitute waiver of formal hearing where agency failed to comply with statutory notice provisions.

## Permits

*Paradyne Corp. v. State of Florida Department of Transportation and Erwin H. Miller, et al.*, 13 FLW 1477 (1st DCA, June 24, 1988)

The First DCA affirmed DOT's final order which revoked Paradyne's road connection permit where Paradyne had failed to construct a connection in accordance with the permit. Paradyne was also required Paradyne to submit a redesign of the connection due to present safety hazards at the existing connection. The Court disapproved, however, that portion of the order requiring Paradyne to construct a drive on its private property for the use and benefit of other abutting landowners as an invalid exercise of the state's police powers.

## Rulemaking

*Department of Transportation v. Blackhawk Quarry Company of Florida*, 13 FLW 1484 (5th DCA, June 23, 1988)

Appellee contended that two DOT pronouncements were administrative rules and thus invalid because they were not promulgated in accordance with the APA. The Fifth DCA affirmed the hearing officer's opinion that DOT's standard operating procedure (SOP) pertaining to cemented coquina shell "created certain rights and adversely affected others" and thus was a rule, not validly promulgated. The H.O. distinguished the S.O.P. from the section dealing with specifications for coquina material for construction, finding the latter to be more in the nature of a contractual provision.

## Committees & Representatives of the Administrative Law Section

### Administrative Law Conference Committee

G. Steven Pfeiffer, Chairman  
P.O. Box 5948  
Tallahassee, FL 32314  
904/222-6277

### Budget Committee

Drucilla E. Bell, Chairman  
Department of Corrections  
Tallahassee, FL 32399  
904/488-2326

### Long-range Planning Committee

Deborah J. Miller, Chairman  
Two South Biscayne Boulevard,  
Suite 2400  
Miami, FL 33131  
305/381-8050

### Legislation Committee

Betty J. Steffens, Chairman  
106 South Monroe  
Tallahassee, FL 32302  
904/224-4070

### Continuing Legal Education Committee

William Hyde, Chairman  
101 East College Avenue  
Tallahassee, FL 32302  
904/222-6891  
Also serves as Section's liaison  
with The Florida Bar's  
CLE Committee.

### Representatives

#### Newsletter

C. Gary Stephens, Chairman  
6200 Courtney Campbell Causeway  
Bayport Plaza, Suite 460  
Tampa, FL 33607  
813/870-3200

#### Bar Journal

Robert Benton, Chairman  
1404 Golf Terrace Drive  
Tallahassee, FL 32301

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CONTINUING LEGAL EDUCATION COMMITTEE  
AND THE  
ADMINISTRATIVE LAW SECTION  
PRESENT

# Administrative Practice Before the Division of Administrative Hearings Seminar

THREE LOCATIONS  
October 7 — November 2, 1988

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

## LECTURE PROGRAM

- 8:00 a.m.- 8:25 a.m. LATE REGISTRATION
- 8:25 a.m.- 8:30 a.m. OPENING REMARKS  
William L. Hyde, Chairman, Administrative Law Section CLE  
Committee, Tallahassee
- 8:30 a.m.- 9:15 a.m. RULE CHALLENGES AND ADJUDICATORY PROCEEDINGS  
James S. Alves, Hopping, Boyd, Green & Sams, Tallahassee
- 9:15 a.m.- 9:45 a.m. PREHEARING PRACTICE AND PROCEDURE  
James W. Linn, Carson & Linn, Tallahassee
- 9:45 a.m.-10:15 a.m. PREPARING THE PROPOSED RECOMMENDED ORDER  
John D.C. Newton II, Carson & Linn, Tallahassee
- 10:15 a.m.-10:45 a.m. A JUDICIAL PERSPECTIVE ON THE APA AND ADMINIS-  
TRATIVE LAW  
Honorable Richard W. Ervin III, First District Court of Appeal,  
Tallahassee
- 10:45 a.m.-11:00 a.m. COFFEE BREAK
- 11:00 a.m.-12:00 noon CURRENT TRENDS IN FEDERAL ADMINISTRATIVE LAW  
Johnny C. Burris, Associate Professor of Law, Nova University  
Center for the Study of Law, Ft. Lauderdale
- 12:00 noon-12:45 p.m. ADMINISTRATIVE PROCEDURE ACT CASE AND STATU-  
TORY LAW UPDATE  
Mary F. Smallwood, Ruden, Barnett, McClosky, Smith, Schus-  
ter & Russell, Tallahassee

## 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.

**CLER CREDIT**

(Maximum 5 hours)

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**DESIGNATION CREDIT**

(Maximum 5 hours)

Administrative and		Labor and Employment Law . . .	5 hours
Governmental Law . . . . .	5 hours	Trial Practice — General . . . . .	5 hours
Appellate Practice . . . . .	2.5 hours	Trial Practice — Commercial . . .	5 hours
General Practice . . . . .	5 hours		

**CERTIFICATION CREDIT**

(Maximum 2.5 hours)

Civil Trial . . . . . 2.5 hours

Policy does not permit double credit within any one of the 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.

**DATES AND LOCATIONS**

October 7, 1988 . . . . . Tallahassee\*\* (Hilton Hotel)  
 October 27, 1988 . . . . . Orlando\* (Harley Hotel)  
 November 2, 1988 . . . . . Miami\* (Hyatt Regency)

\*Videotaped Presentation      \*\*Live

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- 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.

**I plan to attend (check one):**

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- \_\_\_\_\_ ( 28) Orlando (10/27/88)
- \_\_\_\_\_ ( 24) Miami (11/02/88)

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