ADMINISTRATIVE LAW SECTION
Newsletter
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Evidence at DOAH for Attorneys New to Administrative Practice

by Marc Ito

This article is the second part of an article examining common evidentiary issues at the Division of Administrative Hearings (DOAH). Part I of the article, which appeared in the September 2017 issue of the newsletter, addressed the submission of evidence and burdens of proof. In this article, I will address issues related to the admissibility of evidence.

This article will be limited to practice before DOAH and is intended for attorneys new to administrative practice. It will not cover practice in non-DOAH forums, such as the Public Service Commission (PSC) and other administrative tribunals. It also will not cover evidentiary issues that can arise during discovery. It is intended as a roadmap to common evidentiary issues likely to arise in administrative proceedings without delving too deeply into any one issue.

I. What Evidence is Admissible?

A. Any Evidence Rule

Section 120.569(2)(g) is sometimes referred to as the "Any Evidence Rule." It is also the section that the Supreme Court relied on in *Florida Industrial Power Users Group* to hold that administrative tribunals have discretion to apply the Florida

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From the Chair

by Robert Hosay

As we approach the 2018 legislative session in Tallahassee, the Administrative Law Section continues to be busy with many activities. I'll share a few. Regarding legislative session, I would be remiss not to highlight the yeoman's work of our legislative committee, which is chaired by Linda Rigot and supported by Brian Newman, Fred Dudley, Judge John Newton and Cindy Miller. At the time of writing this article, committee weeks leading up to legislative session had just begun and bills had been filed that impact the Florida Administrative Procedure Act (APA). The work of Linda Rigot and this committee is extremely important to ensure that the Section and APA stakeholders are accurately informed and educated on APA matters as they become relevant and are discussed in the legislative process. As we move through this legislative session, please do not hesitate to contact me or any other executive council member if you would like to share your thoughts regarding the impact of any proposed changes to the APA. Thank you Linda, Brian, Fred, Cindy, and Judge Newton for keeping us on top of these very important matters! Your service is appreciated and valued.

During the Section's executive council meeting during The Florida Bar Convention last June, the executive council adopted two new

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legislative positions, adding to the previous 11 positions. The new Section positions adopted were:

> (12) opposes term limits for administrative law judges
>
> (13) opposes legislation that impairs the independence, fairness, impartiality — or impairs the appearance of independence, fairness or impartiality — of administrative law judges, hearing officers, or others performing quasi-judicial functions. As used herein, the term "independence" means freedom to make decisions based on the facts and applicable law without outside control or influence in the decision-making process.

The Florida Bar Board of Governors approved the positions during their July 2, 2017, meeting, which means that the two new positions have been posted as official Section positions.

As you are likely aware, the Florida Constitutional Revision Commission (CRC) has been hard at work. The CRC, created by Article XI, section two of the Florida Constitution, convenes every 20 years, and is tasked with reviewing the state constitution in order to keep it updated by recommending amendments to be included on a forthcoming election ballot. Our immediate past chair, Jowanna N. Oates, appointed Judge Gar Chisenhall, as the Section's liaison to the CRC. In addition to all of his work as chair-elect, Judge Chisenhall has been faithfully and diligently fulfilling his obligation as our liaison to the CRC. Judge Chisenhall, thank you for your relentless service!

Our law school outreach committee has continued to display their tenacious work ethic and dedication to serving the ALS and its purpose. The committee chair, Judge Lynne Quimby-Pennock, continues to run this committee like a well-oiled machine and has great support from her co-chair, Sharlee Hobbs Edwards. Many thanks are owed to Judge Cathy Sellers for stepping in and helping with the "networking nosh" at the University of Florida. Also, a significant thank you is owed to Jennifer Blakeman for leading the Florida Agricultural and Mechanical University nosh. Much of the success of these events was due to the time spent organizing the events and the persistent follow-up by Judge Suzanne Van Wyk. Thank you Judge Van Wyk! This committee is doing great work and needs your help. If you are interested please contact Judge Lynne Quimby-Pennock or Sharlee Hobbs Edwards.

I must include a request to contact Stephen Emmanuel or Jowanna N. Oates if you are interested in submitting an article for publication in *The Florida Bar Journal* or the Section's newsletter. We always need good ideas and articles. Stephen, Jowanna, and Judge Elizabeth McArthur work very hard to ensure production of a quality product and would be excited to hear from you regarding a new article opportunity.

I hope that by reading these highlights, you have gained a more significant appreciation for the hard work performed by so many of the Section's members. There are always tasks to work on and we would love to have your support. Please contact me if you are interested in helping support our initiatives or if you just want to hear more about the Section.

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

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APPELLATE CASE NOTES

by April A. Caminez-Bentley, Tara Price, Gigi Rollini, and Larry Sellers

Bid Protest—Agencies Required to Follow RFA Terms
Brownsville Manor, LP v. Redding Dev. Partners, LLC., 224 So. 3d 891 (Fla. 1st DCA 2017).

Florida Housing Finance Corporation (FHFC) issued a Request for Applications (RFA) for housing credit financing for affordable housing developments located in medium and small counties. The RFA required applicants to submit a form with a mandatory development location point (DLP). If the proposed development was comprised of real property that is not contiguous, or "scattered sites," the DLP was required to be located on the site with the most units that is located within 100 feet of the residential building existing or to be constructed as part of the proposed development. After receiving the applications, FHFC measured the distance between the DLP and certain transit and community services. Applicants received proximity scores based on these distances.

Numerous applications received the maximum total points available, and a random lottery system determined the order in which tied applications would be selected. Brownsville Manor, LP (Brownsville) was not selected for funding but it had a higher lottery number than Redding Development Partners, LLC (Redding), who also received the maximum total points available and was not selected for funding. Redding filed a formal written bid protest under section 120.57(3), Florida Statutes. During the bid protest, deficiencies were identified in two other proposed development applications, and those developers agreed that they should not receive funding. This meant that Brownsville's application, which was not originally selected, was now slated for funding. Because Redding was next in line for funding if one more application was rejected, it sought to disqualify Brownsville's application.

The ALJ held an evidentiary hearing and entered a Recommended Order concluding that Brownsville should be deemed ineligible for funding. The ALJ determined that Brownsville's intent to rely on the future potential of a clustering process was a material, non-waivable deviation from the RFA terms because Brownsville did not start the clustering process prior to submitting its RFA application to FHFC and there was no guarantee that the county would approve Brownsville's clustering approach. FHFC entered a Final Order adopting the ALJ's Recommended Order, making Brownsville ineligible for funding. Brownsville appealed.

The court noted that FHFC was required to interpret the RFA according to its plain language and that Brownsville had complied with all of the applicable RFA requirements at the application stage. The court held that the RFA did not require Brownsville to begin the clustering process or receive a guaranteed approval of its clustering process from the county prior to submitting its RFA application to FHFC. Instead, the RFA's plain language clearly stated that applicants with scattered site proposed developments would be required to demonstrate compliance later, during the credit underwriting process, not during the application process. Finally, the court ruled that it was erroneous for the ALJ to rely on the county's testimony undermining Brownsville's application, as that testimony merely showed that the county was not yet certain whether Brownsville's proposed development would be appropriate for clustering. Thus, the court reversed and remanded to FHFC with instructions to reinstate Brownsville's eligibility for funding.

Charter Schools—Statutory Requirements for Replicating High-Performing Charter Schools
Sch. Bd. of Indian River Cnty. v. Somerset Academy, Inc., 42 Fla. L. Weekly D2108 (Fla. 4th DCA Oct. 4, 2017).

Somerset Academy, Inc. (Somerset) filed two applications to replicate high-performing charter schools with the Indian River School Board (School Board). The School Board interviewed members of Somerset's governing board and evaluated the applications using the Florida Charter School Application Evaluation Instrument as required by rule 6A-6.0786. Both evaluations noted multiple deficiencies with the applications, and resulted in a recommendation by the reviewer that the applications be denied. At a meeting, the School Board voted to deny both applications, and issued two separate letters, with supporting documentation, detailing the specific reasons for its decisions. Somerset then appealed the School Board's decisions to the State Board of Education, which voted to overturn the School Board's decisions.

As an initial matter on appeal, the School Board argued that the State Board's final orders should be reversed because they contained findings and conclusions that were not approved by the members of the State Board, but instead reflected the views of the Commissioner. The court rejected this argument, observing that the final orders were issued by the Commissioner "on behalf of the State Board" and included arguments set forth in Somerset's briefs.

Moving to the merits, the court first adopted the standard of review used by the Second and Fifth District Courts of Appeal in appeals from the State Board, which is whether the record is sufficient to demonstrate that the School Board's decision on a charter application is supported by clear and convincing evidence. On this standard, the court concluded

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that the School Board articulated specific objections recognized by section 1002.33(6), Florida Statutes, to the applications submitted by Somerset, and provided documents to support its determinations that the applications did not materially comply with those statutory requirements. The court also determined that the record contained "clear and convincing evidence that the proposed Somerset schools are not substantially similar to the high-performing charter schools that they would purportedly replicate."

Accordingly, the court reversed State Board's decisions.

Emergency Orders—Facial Sufficiency of Order Restricting License to Practice as a Dental Hygienist
Sanchez v. Dep't of Health, 225 So. 3d 964 (Fla. 1st DCA 2017).

The Department of Health (DOH) entered an emergency order prohibiting Juan Francisco Sanchez from seeing female patients after finding that he engaged in sexual misconduct against five female patients during dental appointments over the span of his first three months of employment as a dental hygienist.

The court denied Mr. Sanchez's petition, determining DOH's emergency order was facially sufficient. The court noted that the licensure restriction was "sufficiently narrowly tailored to be fair," finding Mr. Sanchez's alleged misconduct was readily concealable in the course of carrying out his duties, thus necessitating an immediate restriction from his continued practice of dental hygiene on female patients.

Public Records—Exemptions to Negotiation Meetings in Contract Procurement Process
Carlson v. Dep't of Revenue, 42 Fla. L. Weekly D2083 (Fla. 1st DCA Sept. 29, 2017).

Richard Carlson sued the Department of Revenue (DOR), contending the procurement process used to award a contract to operate DOR's child support payment program violated Florida's Sunshine Law. The trial court entered summary judgment against Carlson, who appealed to the First District Court of Appeal.

On appeal, Carlson first argued not that the evaluation team met outside of the sunshine, but that the team did not meet at all. Instead of holding a meeting, team members individually evaluated the competitors' proposals, individually assigned scores, and individually submitted their scores for consideration by others. Carlson contended that the evaluation team was required to meet in public because it was responsible for "crystalizing" the final procurement decision. The court rejected the argument, observing that because the evaluation team took no formal action, it was not required to hold a public meeting.

Carlson also argued that the negotiation team violated section 286.0113, Florida Statutes, because it "unlawfully closed" non-exempt portions of its meetings. DOR argued that the meeting was properly closed because the statute covers the "entirety of any meeting at which negotiation strategies are discussed." The court rejected that argument, concluding that the "any portion" language limits the exemption to portions of meetings—the portions "at which negotiation strategies are discussed." Having decided that the statute exempts only portions of meetings, the court turned to Carlson's claim that the negotiation team unlawfully closed nonexempt portions of its meetings. The court concluded that the negotiation team did not err in closing portions of its meetings, because "negotiation strategies" encompasses the decisions on which bidders will participate in negotiations as well as the negotiations themselves.

Finally, Carlson argued that DOR's failure to make a "complete recording" of the exempt portions of the meetings violated section 286.0113(2)(c)(2). The court concluded that because DOR did make audio recordings of the meetings, albeit two were inaudible and unrecoverable, DOR did not violate the statute—it suffered a technology failure that does not rise to a statutory violation.

Recommended Orders—Agency Limitations on Rejecting Findings of Fact and Conclusions of Law
Hamilton Downs Horsetrack, LLC v. Dep't of Bus. & Prof'l Reg., 226 So. 3d 1046 (Fla. 1st DCA 2017).

Hamilton Downs Horsetrack, LLC (Hamilton Downs) holds a parimutuel permit for quarter horse racing. In 2013, the Department of Business and Professional Regulation (DBPR) issued Hamilton Downs an operating day license for quarter horse barrel match racing, which required Hamilton Downs to conduct a certain number of quarter horse performances per day during a four-day period in June 2014. Before the June 2014 season, DBPR's rule authorizing barrel match racing was declared invalid as an unadopted rule. *See Fla. Quarter Horse Track Ass'n v. Dep't of Bus. & Prof'l Reg.*, 133 So. 3d 1118 (Fla. 1st DCA 2014). DBPR informed Hamilton Downs that it could not conduct barrel match racing but that it could conduct "flag-drop" racing.

Three weeks before the June 2014 meet, the organization that provided Hamilton Down with its horses and riders canceled. One of the substitute races was a matchup between two horses owned by the same owner, known as a "coupled entry," where every better wins because a bet placed on one horse is in reality a bet on both horses. A meeting was held between Hamilton Downs and DBPR as to how the race should be treated. Hamilton Downs offered to request a replacement race from DBPR if necessary to ensure that it would meet its required racing schedule. A DBPR official instead declared the race official.

Subsequently, DBPR filed an administrative complaint alleging that Hamilton Downs violated section 550.01215(3), Florida Statutes, by failing to operate all the races

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on its operating license schedule. In the administrative proceeding, DBPR argued that the coupled entry race should not qualify as a race because it was not a pari-mutuel race where patrons could place bets. The ALJ rejected this argument and concluded that even if the violation did occur, DBPR should be estopped from penalizing Hamilton Downs. The ALJ recommended that DBPR enter a Final Order dismissing the amended administrative complaint. Instead, DBPR entered a Final Order concluding that it had proved the violation and that estoppel was not applicable. The Final Order also levied a $1,000 fine against Hamilton Downs. Hamilton Downs appealed the Final Order.

On appeal, the court ruled that DBPR erroneously rejected the ALJ's conclusion of law that DBPR had failed to prove the alleged violation in the administrative complaint. The court noted that the administrative complaint charged only that Hamilton Downs had failed to conduct the required number of performances. A performance is defined as a series of events, races, or games. Thus, a race need not qualify as a pari-mutuel race to qualify as a performance pursuant to section 550.01215. The court held that the ALJ was correct to limit the violations to those which are alleged in the administrative complaint, which had alleged only that Hamilton Downs had not sufficiently conducted the number of required races, and did not allege a violation based on the coupled entry race not qualifying as a pari-mutuel race.

The court concluded that the ALJ properly applied the doctrine of equitable estoppel. The ALJ concluded that DBPR officials represented to Hamilton Downs that the race would be counted, and then months later changed its position. Hamilton Downs also relied on DBPR's assurances to its detriment because it offered to request a replacement race and was advised that such a request was not necessary. Furthermore, DBPR's argument that estoppel was inapplicable because the ALJ relied on hearsay testimony was unavailing, because the DBPR officials' statements would be admissible in civil actions as statements by a party agent within the scope of employment during the existence of the relationship. Thus, the court reversed and remanded the case with instructions that DBPR adopt the ALJ's recommended order.

Standing—Horse Breeder Has Standing to Challenge Legal Plan for Distribution of Awards
SCF, Inc. v. Fla. Thoroughbred Breeders' Assoc., Inc., 223 So. 3d 459 (Fla. 4th DCA 2017).

An Ocala thoroughbred racehorse breeder, Southern Cross Farms d/b/a SCF, Inc. (SCF), appealed the ALJ's final order dismissing its administrative proceeding that challenged as noncompliant with statutory requirements the annual plan for the 2016 race year governing the distribution of owners' and breeders' monetary prize awards. That annual plan was created by the Florida Thoroughbred Breeders' & Owners' Association (FTBOA), and approved by the Department of Business & Professional Regulation, Division of Pari-Mutuel Wagering (Division). At issue was whether SCF, a breeder, had legal standing to bring such a challenge.

FTBOA is a private, non-profit corporation that controls in-state thoroughbred racing. FTBOA has been granted legal authority to promote Florida's thoroughbred industry and to collect wagering prize monies and distribute the money as awards to owners of top Florida-bred thoroughbred competitors. The thoroughbred breeders' awards were initially set by statute, but over time the system evolved into one in which FTBOA became empowered with the discretion to decide the amount and distribution of awards—to develop an "annual plan." FTBOA's annual plan must be approved by the Division before implementation.

To determine whether SCF, as a third-party, had a substantial interest in the outcome of an administrative proceeding for standing purposes, the court applied the test set forth in *Agrico Chemical Co. v. Dep't of Environmental Protection*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), which asks two questions: "1) will the party suffer injury in fact, which is of sufficient immediacy to entitle it to a section 120.57 hearing; and 2) does the party have a substantial injury of a type of nature for which the proceeding is designed to protect?"

On these questions, the court determined that SCF's interest in maximizing the payment of the breeders' awards was a substantial interest that could be administratively addressed and resolved. Specifically, the court concluded that SCF was otherwise substantially certain to win an award for the year at issue in light of its 15-year consecutive string of awards, and that the Legislature had neither expressly or impliedly said that breeders, as the parties the statutory framework was designed to benefit, were to be excluded from administratively challenging a plan.

The First District also addressed the claim raised by FTBOA and the Division that the case was moot because all awards for the 2016 year had been issued and paid, leaving no meaningful remedy for SCF. The court held that SCF's appeal was not rendered moot by payment of the awards for the year at issue, where the breeder did not seek payment or rescission of the award on appeal, but sought a determination as to whether it had standing to pursue its claims against FTBOA, which was an important issue likely to recur.

Accordingly, the court reversed the ALJ's dismissal of the breeder's administrative challenge and determined that the breeder had legal standing to challenge FTBOA's annual plan for distribution of the owners' and breeders' awards.

Tara Price and Larry Sellers *practice in the Tallahassee Office of Holland & Knight LLP.*

Gigi Rollini and April Bentley *practice with Messer Caparello, P.A., in Tallahassee.*

DOAH CASE NOTES

Substantial Interest Hearings

Marie L. Henry v. The Fla. Bar, DOAH Case No., 16-4412 (Recommended Order Aug. 11, 2017).

FACTS: Marie L. Henry was admitted to practice law in Florida in 2009. On March 31, 2015, the Florida Supreme Court issued an order suspending Ms. Henry's license to practice law for six months. Ms. Henry filed a Charge of Discrimination with the Florida Commission on Human Relations ("FCHR") alleging that The Florida Bar violated the Florida Civil Rights Act of 1992 ("the FCRA") by applying the Bar Rules differently to African American members as opposed to white members. Ms. Henry also alleged that The Florida Bar retaliated against her for raising ethics complaints alleging racial animus and for exercising her right to seek an impartial judge to preside over a civil suit Ms. Henry had filed against her mortgage loan servicer. FCHR determined there was no reasonable cause to conclude that The Florida Bar had committed an unlawful practice and referred Ms. Henry's Petition for Relief to the Division of Administrative Hearings ("DOAH") for a formal administrative hearing.

OUTCOME: An Administrative Law Judge ("ALJ") issued a Recommended Order concluding that FCHR had no jurisdiction over Ms. Henry's claims. In doing so, he explained that "because the Supreme Court has the exclusive constitutional authority to regulate the discipline of individuals who are admitted to practice law in Florida, the FCRA does not bestow upon the Commission (or DOAH) jurisdiction to review the correctness of the Supreme Court's Suspension Order, or grant [Ms. Henry] the relief from the sanction imposed. Any attempt to do so would violate the Florida Constitution's separation of powers clause." Furthermore, if Ms. Henry could assert a valid claim under the FCRA against The Florida Bar, the ALJ determined that "[t]he facts found in this matter do not establish direct evidence of discrimination on the part of The Florida Bar."

Bertha Delaney v. Agency for Persons with Disabilities, Case No. 17-2254 (Recommended Order Aug. 18, 2017).

FACTS: Cypress Place, Inc. ("Cypress"), is a private, nonprofit corporation providing services to developmentally disabled clients. From April through October 2016, Cypress employed Bertha Delaney as a receptionist. Other than incidental, in-person interactions, Ms. Delaney did not have any contact with Cypress's clients. In early August 2016, an incident at Cypress's facility resulted in an investigation by the Department of Children and Families ("DCF"). Soon afterwards, Cypress directed Ms. Delany to undergo a level 2 background screening, which revealed that she had entered a no-contest plea on June 13, 2001, to third degree grand theft. Because third degree grand theft is a disqualifying offense, Ms. Delaney is ineligible to work as a direct service provider to those with developmental disabilities without an exemption from disqualification. Ms. Delaney then requested an exemption in November 2016. On March 17, 2017, the Agency for Persons with Disabilities ("APD") notified Ms. Delaney that it intended to deny her request because she had failed to submit clear and convincing evidence of her rehabilitation. Ms. Delaney requested a formal administrative hearing, and APD referred this matter to the Division of Administrative Hearings on April 13, 2017.

OUTCOME: The ALJ recommended that APD grant Ms. Delaney's request for an exemption. In doing so, the ALJ concluded that his "opinion as to whether or not Delaney should be granted an exemption is practically worthless since [APD] retains the discretion to do what it wants, regardless, within the confines of section 120.57(1)(*l*)." Moreover, appellate opinions have made it clear that exemption denials "will not generally be considered an abuse of discretion."

Michael Lee Smathers, II v. Agency for Health Care Admin., Case No. 16-3590MTR (Final Order of Dismissal Sept. 13, 2017).

FACTS: If an injured person's medical expenses are covered by Medicaid, then section 409.910, Florida Statutes, the Medicaid Third-Party Liability Act, gives AHCA an automatic lien on a settlement the injured person receives from the liable party. Medicaid's recovery from a settlement is capped at the full amount of medical assistance provided by Medicaid. Because federal law prohibits a state from attaching a Medicaid lien to any portion of an injured party's tort recovery that is not designed as payment for medical care, Medicaid's lien can only encumber the portion of a settlement representing compensation for medical expenses. In order to comply with federal law, section 409.910(11)(f), Florida Statutes, sets forth a formula for determining how settlement proceeds from a tortfeasor should be divided between medical expense damages and all other compensatory damages. If the injured party disagrees with the amount arrived at through application of section 409.910(11)(f), then section 409.910(17)(b) gives the injured party an opportunity for an administrative hearing at which the injured party must prove by clear and convincing evidence that Medicaid should receive less than the amount derived from the formula set forth in section 409.910(11)(f). On June 1, 2012, Michael Lee Smathers, II, was shot twice outside a night-

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club and rendered permanently and severely disabled. Medicaid provided $206,445.41 in medical assistance on Mr. Smathers's behalf. Mr. Smathers eventually entered into a settlement agreement in which he received $1 million. After accounting for attorney's fees and costs, Mr. Smathers's net recovery was $546.894.15. Upon learning of the settlement, AHA asserted its right to a lien on Mr. Smathers's recovery in the amount of $206,445.41. On June 24, 2016, Mr. Smathers exercised his right under section 409.910(17)(b) to contest that amount. Because he only recovered 6.25% of his total provable damages, Mr. Smathers argued that Medicaid should also recover just 6.25% of its total expenditures, i.e., $12,903. The final hearing in this matter took place as scheduled on March 9, 2017. On April 18, 2017, the U.S. District Court for the Northern District of Florida entered a Final Judgment in Gallardo v. Dudek declaring that section 409.910(17)(b) is preempted by federal law to the extent that the statute authorizes AHCA to seek reimbursement of past Medicaid payments from portions of a settlement representing future medical expenses. The federal court also enjoined AHCA from requiring a Medicaid recipient to affirmatively disprove the lien amount through clear and convincing evidence.

OUTCOME: In light of the federal court's ruling, the ALJ had to determine whether the administrative remedy in section 409.910(17)(b) remained available to Mr. Smathers. Ultimately, the ALJ concluded that "by deforming the administrative remedy in paragraph (17)(b), Gallardo has pulled the rug out from under DOAH, which as a consequence of the district court's ruling has no remedy to offer [Medicaid] recipients, such as Smathers, who had no choice but to come here seeking relief. Lacking the power, now, to provide an administrative remedy, the undersigned must dismiss this case for want of jurisdiction." Accordingly, the ALJ issued a Final Order of Dismissal, dismissing Mr. Smather's petition based on a lack of jurisdiction.

AHCA has appealed the Final Order of Dismissal to the First District Court of Appeal, where the appeal is pending as Case No. 1D17-4239.

Liset Museguez, as the Court Appointed Guardian of Sergio Museguez v. Agency for Health Care Admin., Case No. 16-7379MTR (Final Order Sept. 19, 2017).

FACTS: Sergio Museguez was catastrophically injured due to being struck by lightning on June 15, 2012 and was rendered permanently and severely disabled. Mr. Museguez and his employer's insurance carrier entered into a settlement resulting in Mr. Museguez receiving $1 million. On December 1, 2016, the Agency for Health Care Administration notified Mr. Museguez's attorney that Medicaid's lien for medical expenses paid on Mr. Museguez's behalf was $116,032.84, the amount of funds expended by Medicaid on Mr. Museguez's behalf. Mr. Museguez's court-appointed guardian filed a Petition to contest the Medicaid lien amount, and a final hearing was scheduled for March 14, 2017. The final hearing proceeded as scheduled, but the U.S. District Court for the Northern District of Florida issued an Order on April 21, 2017, in Gallardo v. Dudek, enjoining AHCA from enforcing section 409.910(17)(b), Florida Statutes. Via a Joint Status Report filed with DOAH on May 25, 2017, AHCA argued that further proceedings on Mr. Museguez's Petition should be stayed pending the outcome of the federal litigation.

OUTCOME: The ALJ noted that the ALJ in Smathers "determined that the injunction in Gallardo so eviscerates the formula in section 409.910(11)(f) that it deprives DOAH of jurisdiction to go forward." Nevertheless, the ALJ reached a different

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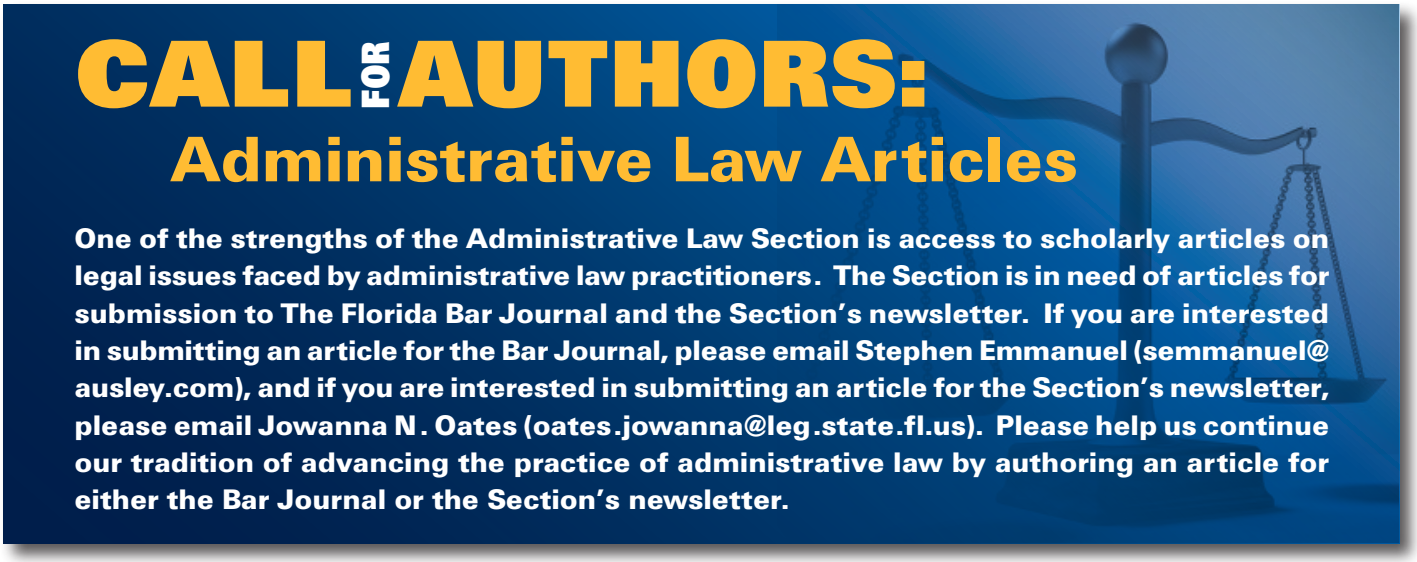

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conclusion. In doing so, the ALJ noted that parties such as Mr. Museguez would be deprived of "any remedy at all" if DOAH no longer had jurisdiction to adjudicate these disputes. In addition, while the ALJ acknowledged the district court's determination that Medicaid recipients could no longer be required to affirmatively disprove the formula amount by clear and convincing evidence, the ALJ noted that section 120.57(1)(j), Florida Statutes, provides for the preponderance of the evidence standard to serve as a default evidentiary standard unless another one specifically applies. Also, the ALJ determined that aspects of the instant case materially distinguished it from Gallardo. Thus, the ALJ ultimately held that AHCA was only entitled to $23,206.57 in satisfaction of its Medicaid lien.

Kanter Real Estate, LLC v. Dep't of Envtl. Protection, et al., Case Nos. 17-0666 & 17-0667 (Recommended Order Oct. 10, 2017).

FACTS: Kanter Real Estate, LLC ("Kanter"), owns 20,000 acres of property in the historic Everglades. On July 2, 2015, Kanter filed an application with the Department of Environmental Protection ("DEP") seeking an oil and gas drilling permit. On November 16, 2016, DEP issued a Notice of Denial, asserting that Kanter failed to demonstrate that the relevant factors weighed in favor of issuance pursuant to section 377.241, Florida Statutes. Kanter petitioned for a formal administrative hearing, and DEP referred the matter to the Division of Administrative Hearings on January 31, 2017. The City of Miramar ("Miramar") filed a petition to intervene on March 14, 2017, and the ALJ granted that request, over objection, on March 24, 2017. Broward County also moved to intervene on April 14, 2017, and the ALJ granted that request, over objection, on April 24, 2017.

OUTCOME: The ALJ issued a Recommended Order recommending that Kanter's application be approved. In the course of making that recommendation, the ALJ addressed a continuing dispute regarding Miramar and Broward County's standing. The ALJ's Order of Pre-hearing Instructions provided that "[t]he failure to identify [in the Joint Pre-Hearing Stipulation] issues of fact or law remaining to be litigated may constitute a waiver and elimination of those issues. See Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc., 174 So. 3d 1037 (Fla. 4th DCA 2015)." Accordingly, the ALJ ruled that "the failure to raise Intervenors' standing in the Joint Pre-hearing Stipulation, despite the issue having been disputed earlier in the proceeding, and since the issue was not raised during the evidentiary portion of the hearing until literally at the final on-the-record minute . . . , the issue is deemed to have been waived, and Intervenors are determined to have standing to proceed."

Julie McCue v. Pam Stewart, as Commissioner of Education, Case No. 17-0423 (Recommended Order Oct. 13, 2017).

FACTS: In September 2016, Julie McCue took the written performance assessment section of the Florida Educational Leadership Examination and received a failing score. After the Department of Education notified her that her essay had been scored correctly, Ms. McCue requested an administrative hearing that was scheduled for June 13, 2017. On Friday afternoon, June 9, 2017, Ms. McCue's attorney filed an "Unopposed Motion to Withdraw as Counsel and Emergency Motion to Continue Hearing" based on "significant and irreconcilable differences" between Ms. McCue and her attorney. During a telephonic hearing at 5:00 pm on June 9, 2017, Ms. McCue's attorney explained that the differences related to information learned earlier in the week regarding the opinions that Ms. McCue's expert witness would be able to offer at the final hearing. Ms. McCue's attorney also indicated that the differences involved funding of fees for the final hearing.

OUTCOME: The ALJ did not continue the final hearing. Ultimately, the ALJ recommended that the Education Practices Commission enter a final order rejecting Ms. McCue's challenge to her exam score. In endnote 2 of the Recommended Order, the ALJ explained her ruling, which had been announced to the parties in a telephonic hearing on the motion to withdraw/continue. The ALJ noted that Florida Administrative Code Rule 28-106.210 requires that motions for continuance filed less than five days prior to a hearing must demonstrate that an emergency exists. The ALJ ruled that no emergency had been demonstrated. Furthermore, the ALJ determined that no emergency was created by Ms. McCue's attorney's motion to withdraw. As stated by the ALJ, "[t]he dispute between counsel and [Ms. McCue] may have supported permissive withdrawal under The Florida Bar's rules and the granting of a motion to withdraw, if presented at an earlier time. However, on the eve of hearing, an alternative option under the Bar rules was to order counsel to continue representing [Ms. McCue] despite cause for terminating the representation. See Fla. Bar. Reg. R. 4-1.16(c). Indeed, under similar circumstances, it has been held to be an abuse of discretion to grant a motion to withdraw." See Garden v. Garden, 834 So. 2d 190 (Fla. 2d DCA 2002).

Rule Challenges

Fla. Ass'n of Homes and Servs. for the Aging, Inc., d/b/a LeadingAge Fla., et al., v. Agency for Health Care Admin. and Dep't of Elder Affairs, Case Nos: 17-5388RE, 17-5409RE, 17-5445RE (Final Order Oct, 27, 2017).

FACTS: In the aftermath of Hurricane Irma and the death of eight nursing home residents in Hollywood Hills, Florida, the Department of Elder Affairs ("DOEA") and the Agency for Health Care Administration ("AHCA") adopted Emergency Rules 58AER17-1 and 59AER17-1 on September 16, 2017. The emergency

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rules required all nursing homes and assisted living facilities ("ALFs") to: (a) develop a plan regarding emergency environmental control by October 31, 2017; (b) acquire a generator by November 15, 2017; and (c) acquire enough fuel by November 15, 2017, to power that generator so that it can maintain temperatures at 80 degrees or less for at least 96 hours. Associations representing many nursing homes and ALFs challenged the emergency rules, arguing that there was no "emergency" within the meaning of section 120.54(4), Florida Statutes, and that the emergency rules were invalid exercises of delegated legislative authority. Because section 120.56(5), Florida Statutes, establishes an expedited timeframe for resolving emergency rule challenges, the Administrative Law Judge ("ALJ") set the final hearing for October 12 and 13, 2017. In addition to the justifications cited in the preambles to the emergency rules, AHCA and DOEA argued during the final hearing that nursing homes and ALFs need to be more self-sufficient in case another disaster prevents public services from being restored in a timely manner. On the first day of the final hearing, AHCA and DOEA adopted emergency variance rules setting forth a variance procedure by which nursing homes and ALFs could seek to be excused from the deadlines imposed by the emergency rules.

OUTCOME: The ALJ issued a Final Order on October 17, 2017, determining that the emergency rules were invalid. In doing so, the ALJ found that there was not "an immediate danger to the public health, safety, or welfare." The ALJ found that "[t]here was no evidence at the final hearing indicating that the tragic situation at Hollywood Hills was representative of the situation at any other facilities. The fact that there were no similar incidents at any of the multitude of other nursing homes and ALFs affected by Hurricane Irma suggest that it was not." The ALJ also found that the adoption of the emergency variance rules undermined AHCA's and DOEA's argument that Floridians were in "immediate danger." The ALJ found that "the greater weight of the evidence demonstrates that it is impossible for the vast majority of nursing homes and ALFs currently noncompliant with the Emergency Rules to achieve compliance by November 15, 2017." Accordingly, the ALJ concluded that the emergency rules were arbitrary or capricious (and thus legally invalid), in part because AHCA and DOEA "did not assess whether it was reasonable (or even possible) for nursing homes and ALFs to comply with the Emergency Rules by November 15, 2017."

Attorney's Fees

Stephen J. Williams, as a Trustee for the Sparkhill Trust v. Fla. Dep't of Highway Safety and Motor Vehicles, Case No. 17-2090F (Amended Final Order Aug. 11, 2017).

FACTS: On March 3, 2017, an ALJ issued an Amended Final Order in Case No. 16-6127RU, determining that a portion of the Florida Department of Highway Safety and Motor Vehicles Procedure Manual TL-1 and Technical Advisory RS/TL 14-18 were unadopted rules. The ALJ retained jurisdiction in order to award attorney's fees and costs, "as applicable." On April 6, 2017, Stephen J. Williams, as a Trustee for the Sparkhill Trust, filed a motion seeking $86,310.00 in fees and $119.73 in costs. The Department of Highway Safety and Motor Vehicles ("the Department") responded by asserting Mr. Williams was not entitled to any fees because he is not an attorney for purposes of section 120.595(4), Florida Statutes. Mr. Williams has a law degree from the University of Connecticut School of Law, and he is licensed to practice in Connecticut, New York, and the District of Columbia. However, Mr. Williams is currently suspending from practicing in those jurisdictions. While Mr. Williams is a lawyer on the Roll of Solicitors in England and Wales, he is not currently authorized to practice in those jurisdictions because he lacks a practicing certificate. In addition, Mr. Williams is not licensed to practice in Florida and was not so licensed during the pendency of Case No. 16-6127RU.

OUTCOME: The Florida Supreme Court, which has exclusive jurisdiction over the practice of law in Florida, has adopted The Rules Regulating The Florida Bar ("the Bar Rules"). The Bar Rules govern the licensed and unlicensed practice of law in Florida. Rule 10-2.1(c) of the Bar Rules states in pertinent part that "a non[-]lawyer or non[-]attorney is an individual who is not a member of The Florida Bar. This includes, but is not limited to lawyers admitted in other jurisdictions." The ALJ noted that "[c]onsonant with this rule, Florida courts consistently held that attorneys who are not licensed to practice law in Florida—even if admitted to practice law in other jurisdictions—are considered 'non-attorneys' under Florida law, and, as such, are not entitled to attorney's fees awards." As for Mr. Williams' argument that he is entitled to fees because he is licensed in other jurisdictions, the ALJ held that "an attorney is only engaged in the authorized practice of law in Florida, for purposes of being entitled to attorney's fees under Florida law, if

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he or she is a member of The Florida Bar or is otherwise authorized to do so under the applicable exceptions to The Florida Bar licensure requirement." Accordingly, the ALJ held that Mr. Williams was not entitled to an award of fees. However, the ALJ did conclude that Mr. Williams was entitled to recover the costs associated with prosecuting Case No. 16-6127RU. Finally, while the ALJ noted Mr. Williams' allegation that the Department continues to enforce the provisions determined to be unadopted rules, despite the fact that section 120.56(4)(e) requires an agency to "immediately discontinue all reliance" on unadopted rules, the ALJ noted that DOAH has no authority to enforce a DOAH final order. Instead, "jurisdiction to enforce agency action lies in the circuit courts of this state, pursuant to section 120.69."

Non-Final Orders

Daryl Bryant v. Pam Stewart, as Commissioner of Education, Case No. 17-0424 (Amended Order Denying Respondent's Motion to Limit Scope of Proceeding, April 7, 2017).

See also Julie McCue v. Pam Stewart, as Commissioner of Education, Case No. 17-0423 (Order Denying Respondent's Motion to Limit Scope of Proceeding, April 5, 2017) (same motion and ruling in a challenge to a failed score on the Florida Educational Leadership Examination's written performance assessment).

FACTS: Daryl Bryant took the Florida Teacher Certification Examination's General Knowledge ("GK") essay on June 25, 2016. He received a score of seven (on a scale of two to 12 points); a score of eight was required to pass the exam. After the Department of Education ("DOE") notified Mr. Bryant that his essay had been scored correctly, he requested a formal administrative hearing. On February 16, 2017, the Commissioner of Education ("the Commissioner") filed an "Amended Motion to Limit the Scope of Review in This Matter." By this motion, the Commissioner asked that the formal hearing be limited to a review of the exam grading process, and not a review of the exam content or Mr. Bryant's exam answer. In support thereof, the Commissioner noted that governmental agency testing materials are exempt from public records requests and that section1008.24, Florida Statutes, makes the Commissioner's testing materials confidential.

OUTCOME: The ALJ noted that section 1012.56(9), Florida Statutes, requires DOE to provide procedures for an applicant who failed an examination developed by DOE to review his or her examination questions and his or her incorrect answers to those questions. The ALJ also noted that section 1012.56(9)(e) requires the Commissioner to maintain the confidentiality of the examination. In seeking to harmonize these statutes, the ALJ ruled that "since an examinee such as [Mr. Bryant] has the right to review the FTCE essay question and answer that yielded the failed score, then there is no basis to limit the scope of this de novo proceeding to preclude consideration of that material." While acknowledging the Commissioner's concern that Mr. Bryant could gain an unfair advantage by gaining access to the exam question and answer, the ALJ noted that "[t]hat is not a reason to deny [Mr. Bryant] his right to review the exam question and answer for which he received a failed score, or his right to a de novo hearing to contest [the Commissioner]'s decision that the score he was given is correct." Nevertheless, the ALJ gave the parties an opportunity to propose agreed procedures designed to address the Commissioner's concern while allowing Mr. Bryant to present his case as to why he should have received a passing score.

Keith St. Germain Nursery Farms v. Fla. Dep't of Health, Case No. 17-5011RU (Non-Final Order Sept. 25, 2017).

FACTS: On August 17, 2017, Keith St. German Nursery Farms ("the Nursery") filed a petition with the Department of Health ("DOH") for a formal administrative hearing to contest DOH's intended denial of the Nursery's request for registration as a marijuana treatment center. The Department denied the Nursery's request and referred the petition to an informal hearing officer for a hearing pursuant to section 120.57(2), Florida Statutes. On September 14, 2017, the Nursery filed an amended petition with the Division of Administrative Hearings ("DOAH") and DOH, alleging that DOH's intended denial of the Nursery's registration is based on an unadopted rule. On September 21, 2017, DOH filed a motion to dismiss or strike portions of the Nursery's petition. In support thereof, DOH argued that DOAH has no jurisdiction to consider the intended registration denial within the context of an unadopted rule challenge pursuant to section 120.56(4), Florida Statutes.

OUTCOME: The ALJ denied DOH's motion to dismiss without prejudice. In doing so, the ALJ distinguished substantial interest proceedings that implicate an unadopted rule and those that do not. "As mentioned, it is the Department's prerogative to decide, subject to judicial review, whether the Amended Petition involves disputes issues of material fact. In this case, however, the question is not even close. [The Nursery] alleges that the Department is attempting to determine its substantial interests based upon an unadopted rule. This is something that the Department cannot lawfully do. See § 120.57(1)(e)1., Fla. Stat. ("An agency . . . may not base agency action that determines the substantial interests of a party on an unadopted rule[.]"). Moreover, [the Nursery] is plainly entitled to challenge the intended denial of its application on the ground that such proposed agency action is based on an alleged unadopted rule, as it has. § 120.57(1)(e)2., Fla. Stat. Thus, the substantial interest portion of the Amended Petition is inextricably intertwined with [the Nursery]'s section 120.56(4) claim over which DOAH indisputably has final order authority."

ALJ Q&A

by Richard J. Shoop

This edition of ALJ Q&A features one of the Division of Administrative Hearings' ("DOAH") senior administrative law judges ("ALJ"), the Honorable Bram D. E. Canter. Judge Canter received his J.D. degree from the University of Florida Levin College of Law and his LL.M. degree in Environmental Law, summa cum laude from George Washington University. He was Director of the Water Law Center at the University of Florida's College of Law, Assistant General Counsel at the former Department of Environmental Regulation, and a private practitioner for 21 years before becoming an ALJ in 2005. He presides exclusively over cases involving environmental and land use law. He is the author of numerous articles on environmental law, water law, and administrative law. Judge Canter was born in Kentucky and spent his childhood there before he and his family moved to Melbourne Beach, Florida at the age of 12. He was drafted into the Army during the Vietnam War, but was assigned to NATO forces in Germany. Judge Canter had planned to be an electrical engineer, but was inspired by an undergraduate professor of constitutional law at Vincennes University to become a lawyer. He was able to work with Dean Frank Maloney, a nationally-recognized expert in water law, at the University of Florida's College of Law, which is how he ended up having a career in water law and environmental law.

When I asked him for an interview, Judge Canter warned me that he was getting cranky since he is nearing retirement. But the man I interviewed over lunch was warm and friendly, and readily shared his thoughts on a variety of topics. I hope that you enjoy the highlights of our conversation that appear below.

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

BC: Basically, it's because I've done exclusively environmental law my whole career, which uses administrative law. I found it to be the primary forum in which environmental law is practiced. My practice got me into circuit court, too, but it was predominantly administrative law that I used. I came to environmental law first, then administrative law.

RS: So what made you decide to become an ALJ?

BC: Well, I think I was attracted to being an ALJ for the same reason that lawyers are attracted to becoming circuit court judges. Once you're in the process and gain some experience, I think you're naturally attracted to the person who determines the outcome, and also the prestige that comes with it. But on a more practical level, I was in private practice for about 21 years, the last eight of those years as a solo practitioner, and there came a point where the work for my two anchor clients (one a big oil company and the other a developer) was wrapping up. I had to make some kind of transition. So that's when I looked into the option of becoming an ALJ. I was actually offered a position at a law firm, but told them that I had applied to be an ALJ and if I was offered the ALJ job I would take it. They said they needed me badly and would take the risk. A week and a half later I was offered the ALJ position.

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

BC: I think what I alluded to before about determining the outcome, making sure it's the right outcome under the facts and the law. I mean, in a way, you could say that, as an ALJ, you always win because you always get to write the outcome you want. As an advocate, either as a private attorney or as an agency attorney, you're hoping for a certain outcome, but of course you don't control the outcome. That's what's so rewarding about being a judge. You can make the outcome come out the way you think it should be, not based on your personal desires, but based on the facts and the law. I think that's really the most satisfying thing. Also, it just so happens that DOAH has a really fantastic group of ALJs and staff, and the comradery, the stimulating discussions, and the support are great. Without that, this other thing that I am talking about, making the right outcome might not be enough to make me happy. It's a great place to work and very satisfying.

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

BC: I would say that it's lawyers not evaluating their cases very well. And case evaluation is an evolving thing. When you go into a case, you have an initial evaluation, discuss it with your client, and you and your client have an understanding of what you are trying to accomplish. But case evaluation is an evolving process because in discovery you can find out things that might cause you to let go of a claim, or add a claim, or change your strategy completely. So the evaluation of a case is an evolving process and you have to keep your client informed of the changes. What I see too often is that somebody at the hearing doesn't seem to know that the facts and the law are strongly against them, which begs the question why can't they see that? Why are they in a hearing, spending the client's money this way? I would say the other thing besides not properly evaluating the case is a lack of attention to the goal of persuasion in the hearing. Lawyers often just present evidence on each issue, but they don't think about making sure their evidence is more persuasive than their opponent's evidence and showing the ALJ why their evidence is more persuasive.

RS: To the extent you can, describe what a typical day looks like for you.

BC: Well, there are days in the office and days on the road for hearings. I do exclusively environmental and land use law cases and the hearings in my cases are mostly outside of

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Tallahassee. I will use video teleconferencing if it's going to be a one-day hearing, but environmental and land use cases are usually longer, so I generally have to travel to hearings. I like presiding over hearings, which I think are entertaining and very stimulating. In the office I am generally writing orders. My environmental and land use cases generally have a very confident bar. I don't have as many pro se petitioners as appear as those involved in other kinds of cases. My cases tend to involve a lot of motion practice. In environmental law, motions to dismiss for lack of standing, motions to strike, and motions in limine are common. Some of these motions are very complicated, and take up a lot of my time. I may devote several days to writing an order on a motion. So, in the office, I am basically, writing, writing, writing. Many of my recommended orders are long, with over a 100 findings of fact and conclusions of law. I benefit a lot from talking with other ALJs. I talk to them about legal issues I'm working on. So a part of each day is talking with my colleagues about unusual issues that arise in our cases.

RS: How do you use technology in your work?

BC: Well, not in a very extensive way, other than researching on Lexis, using our online docket, which I think is the best in Florida, and teleconferencing. I think that's about it. In my hearings, I'm seeing more evidence presented with three dimensional graphics, which are pretty impressive, because you can take an image and turn it in all directions. Also, I see drone videos becoming more common in environmental cases. They're really good because a helicopter can do a fly-over video, but it's limited and expensive. Now there are companies that make drone video services available, and the drone can fly over a site that is the subject of an environmental case, hover, get low, get high, and the scale is really good. It's really neat. I don't bring a laptop into the courtroom because I don't want to hide behind my computer. I find that taking notes by hand helps me stay alert during hearings. I'm still going to read a transcript from start to finish when it comes in. I'm taking notes specifically to stay alert, not because I might fall asleep, but so I'll know exactly what was said. It's a demanding thing to give constant attention, without a lapse. Other participants in the proceeding can just zone out momentarily, but, as a judge, you have to be ready for an objection that could come at any minute about what was just said. By taking notes, I always know what was said, and, if there is an objection, I know what to do. I will usually put a star next to any important notes and I'll review those starred notes when I'm preparing my recommended order.

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

BC: I think the size and importance of its role in our legal system. When I was in law school, I took a Florida administrative law class, and the professor brought in and handed out our course materials, which were just six or seven administrative law cases. That's all that existed in Florida at that time, and that's all we had to go on to try to figure out how administrative law was going to work. I was hired around 1979 by a Chicago lawyer who was working on an administrative case in Florida and he needed help to understand Florida administrative law because there wasn't enough information to figure it out on his own. But now the body of administrative law is of course so much bigger, and the use of it by agencies is much more extensive. For example, when DOAH was first created, the number of agencies that referred cases to DOAH, and the total number of cases handled at DOAH were much smaller. Now, agencies and young lawyers take for granted that this is how it works. Whereas before, it was civil law and circuit courts which everybody understood to be how the system worked, and administrative law was just a peculiar little thing off to the side, now I think it is on par with the civil law system. So much important activity goes to DOAH for review by ALJs and is addressed in their final orders and recommended orders. That's the biggest change I've seen.

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

BC: That's easy to answer because DOAH regularly has law school externs, second and third year law students, who we supervise and there are three things I am always telling them. First, in law school, you're learning the law, it's the law, the law, but when you get out in practice, it's going to be the facts, the facts, the facts. I tell them it's not just general facts, but precisely what words were used. They have to dig into the record and find out exactly what was presented. I help them understand that factual details usually determine who wins. We all know what the law is. The question is what are the facts in this case and what was shown, what was presented? The second thing is what I said before about focusing on persuasion. The whole point is to persuade the ALJ that you're right. I am there to see who persuades me. I'm listening for what's persuasive to me. At the beginning of the hearing, I know the opposing legal positions. For example, one side might be saying the environment will be harmed by a proposed development, and the other side says it won't be harmed. I'm waiting to see who persuades me with their evidence. Later, I'm writing an order about what persuaded me. So it is important to think about what makes your evidence more persuasive, and then communicate that to the judge. Then the third thing I tell the externs is to try to reduce stress in your legal career. Being a lawyer is an inherently stressful enterprise. You can't eliminate all the stress, but you can take measures to reduce it. Stress can grind your bones into dust. I have a lawyer friend who said he thrived on stress, and then, a little while later, he had a heart attack. Lawyers need to be mindful of stress throughout their careers.

RS: What do you like to do for fun?

BC: I've played guitar all my life. I'm

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one of the best fat-fingered guitarist you'll ever meet. I like to garden. I love to be outdoors. I'm always doing something outside. I live on five acres and I have fruit trees, blueberries and grapes, and many flowering plants. I'm an avid golfer. I play a lot of online chess and love it because I'm playing with people all over the world and it's amazing how chess brings a commonality to people of all countries. I playing a game right now with a guy in the Congo, and I'm trying to get a mental picture of him sitting at a computer and playing chess with this guy in Florida. I play people all over the world, including countries we have tensions with, like Iran, Iraq, Afghanistan, and Russia.

RS: How do you manage to balance your work and your personal life?

BC: It's not really hard, except for the long out-of-town hearings. Two-week hearings are not uncommon. I have two or three of those every year. That's a long time away. When you're a young lawyer, you might think, "Oh, this is cool. Someone else is paying for this. I'm out of town on a business adventure." As an ALJ, by yourself, unable to fraternize with the parties, I don't care how nice the hotels and restaurants are, it gets old. But if I'm not out of town, I rarely have to work late. Sometimes I'll have a tough order, and I'll stay late or come in on the weekend, but most often it's office hours, so it's not difficult to maintain a balance. It's when I have a lot of hearings on the calendar, and none of them go away, that it gets difficult and makes it hard on my wife.

RS: When it's all said and done, how would you like to be remembered as an ALJ?

BC: I want to be remembered as fair and impartial. That's an ALJ's job, that's our main job. That's why you have a judicial branch, to have some place to take a dispute where the issues will be reviewed objectively by a person without any personal stake or political stake in the outcome. If one party is admirable and is represented by a very professional, cordial attorney, and the other party is a jerk and has a jerk for a lawyer, the jerks are going to win if the facts and the law are on their side. They're going to win even if they made the proceeding unpleasant. Just give me the right facts, show me the law, and you're going to win. I don't care about anything else. I hope that's how I'm remembered. I'd rather be remembered as fair than smart. That's how important I believe it is.

Richard J. Shoop *is the Agency Clerk for the Agency for Health Care Administration. He attended the University of Miami for both undergraduate studies and law school, obtaining a Bachelor of Arts in History with General Honors in 1996 and a Juris Doctor in 1999. He began his legal career at the Quincy office of Legal Services of North Florida, Inc. In 2001, Mr. Shoop went to work for the State of Florida, first with the Agency for Health Care Administration and then with the Department of Health as a prosecuting attorney for the Boards of Medicine, Osteopathic Medicine and Psychology. He accepted the position of Agency Clerk for the Agency for Health Care Administration in 2004. Mr. Shoop served as a member of the Administrative Law Section's Executive Council from 2009 to 2017, and is a past chair of the section.*

Law School Liaison

Fall 2017 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of the Florida State University College of Law students and faculty. It also lists the rich set of programs the College of Law hosted during the fall 2017 semester. We hope Section members were able to join us for one or more of these programs.

Fall 2017 Events

The College of Law had a full slate of administrative law events and activities during the fall semester.

The Psychology of Climate Change: Why Do People Believe What They Believe?

This panel discussion, held on September 29, 2017, and organized by Professor Shi-Ling Hsu, explored cutting-edge research on the psychology of climate change. Speakers included Janet Swim, Professor of Psychology, Penn State University; Jerry Taylor, President, Niskanen Center; Irina Feygina, Director of Behavioral Science and Assessment, Climate Central; John Cook, Research Assistant Professor, George Mason University; and Janet Bowman, Senior Policy Advisor, Florida Chapter of The Nature Conservancy. A recording of the panel is available on our webpage for those who could not attend.

Guest Lectures

Jason Lichtstein, Partner at Akerman, LLP and former President of the Florida Brownfields Association, guest lectured about Brownfields redevelopment in Florida in Professor David Markell's environmental law course.

Rebecca O'Hara, Senior Legislative Advocate with the Florida League of Cities, guest lectured about the implementation of water quality standards in Florida in Professor David Markell's environmental law course.

Fall 2017 Distinguished Lecture

Professor Vicki Been, Boxer Family Professor of Law, New York University School of Law, presented our Fall 2017 Distinguished Lecture, entitled "The City NIMBY & the Suburban NIMBY," on October 25, 2017.

Energy Policy and Markets in a Shifting Federal-State Landscape

This symposium, convened by Professor Hannah Wiseman, on November 8, 2017, examined the changing energy regulatory and economic landscape from the local to the federal levels. Symposium speakers included Lincoln Davies, Hugh B. Brown Presidential Endowed Chair in Law, University of Utah College of Law; Dr. Shanti Gamper-Rabindran, Assistant Professor, Graduate School of Public and International Affairs, University of Pittsburgh; Emily Hammond, Professor of Law, The George Washington University Law School; Kate Konschnik, Director of Harvard Law School's Environmental Policy Initiative of the Environmental Law Program and Lecturer on Law; Felix Mormann, Associate Professor, Texas A&M University School of Law and Faculty Fellow, Steyer-Taylor Center for Energy Policy and Finance, Stanford University; Jim Rossi, Professor and Director, Program in Law and Government, Vanderbilt Law School; and Kristen van de Biezenbos, Assistant Professor, University of Calgary Faculty of Law.

Recent Student Achievements

- Jill Bowen has been selected for the Florida House of Representatives Legislative Internship Program. Jill will be doing research, bill drafting and analysis with the Commerce Committee.
- Alan LaCerra earned a book award for Comparative Law this summer while at the University of Oxford. Alan now holds five books awards in total (Legal Writing and Research I, Legal Writing and Research II, Criminal Law, Legislation and Regulation, and Comparative Law).
- Mallory Neumann was selected as a member of Class XIII of the Florida Gubernatorial Fellows Program, a program to provide students with leadership experience in state government and public policy matters. Mallory will be working with the Florida Department of Agriculture and Consumer Services, where she will be assisting the Department in implementing the FDA Food Safety Modernization Act at the state level and researching antibiotic use in food-producing animals.
- Daniel Wolfe has been named a 2018 John A. Knauss Marine Policy Fellowship Finalist by the National Oceanic and Atmospheric Administration. This fellowship will allow Daniel to be matched with a host in the legislative or executive branches of government. Daniel will be

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serving a one-year assignment in Washington, D.C. to work on policy decisions affecting ocean, coastal and Great Lakes resources.

- Several College of Law students are gaining invaluable experience in the fall through our outstanding Externship Program:
  - Jessica Farrell – Earthjustice
  - Janaye Garrett – NextEra/ Florida Power & Light
  - Jessica Rodriguez – Division of Administrative Hearings (DOAH)
  - Michelle Snoberger – Florida Housing Finance Corporation

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

Log on to The Florida Bar's website (www.FLORIDABAR.org) and go to the "Member Profile" link under "Member Tools."

Administrative Law Section Awards

The Administrative Law Section is seeking nominations for two new awards: the S. Curtis Kiser Administrative Lawyer of the Year Award and the Administrative Law Section Outstanding Service Award.

The S. Curtis Kiser Administrative Lawyer of the Year Award is named after Senator S. Curtis Kiser, a 1967 graduate of the University of Iowa and a 1970 graduate of the Florida State University College of Law. Senator Kiser has a long and distinguished career in public service to the State of Florida. His public service includes: State Representative (1972-1982); Senator (1984-1994); Public Service Commission Nominating Council (1978-1994); General Counsel for the Public Service Commission; and Commissioner, Public Employees Relations Commission. During Senator Kiser's legislative service, he was the prime sponsor of legislation that established the Florida Evidence Code and the Administrative Procedure Act.

The S. Curtis Kiser Award will be presented to a member of The Florida Bar who has made significant contributions to the field of administrative law in Florida.

The Administrative Law Section Outstanding Service Award will be presented to a member of the Administrative Law Section Executive Council (other than the chair) who has provided outstanding leadership for the Section.

Applications for both awards will be available on January 8, 2018, on the Section's website at: http://www.flaadminlaw.org/. The deadline for applications is February 16, 2018.

For additional information, please contact Jowanna N. Oates at (850) 488-9110 or oates.jowanna@leg.state.fl.us.

Administrative Law Section

ADMINISTRATIVE LAW SECTION
MEMBERSHIP APPLICATION (ATTORNEY)
(Item # 8011001)

This is a special invitation for you to become a member of the Administrative Law Section of The Florida Bar. Membership in this Section will provide you with interesting and informative ideas. It will help keep you informed on new developments in the field of administrative law. As a Section member, you will meet with lawyers sharing similar interests and problems and work with them in forwarding the public and professional needs of the Bar.

To join, make your check payable to "**THE FLORIDA BAR**" and return your check in the amount of $25 and this completed application to:

ADMINISTRATIVE LAW SECTION
THE FLORIDA BAR
651 E. JEFFERSON STREET
TALLAHASSEE, FL 32399-2300

NAME _____ ATTORNEY NO. _____

MAILING ADDRESS _____

CITY _____ STATE _____ ZIP _____

EMAIL ADDRESS _____

Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues cover the period from July 1 to June 30.

For additional information about the Administrative Law Section, please visit our website:
http://www.flaadminlaw.org/

EVIDENCE AT DOAH
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Evidence Code. The statute provides:

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida.

§ 120.569(2)(g), Fla. Stat. (2017). Right off the bat, the exclusion of irrelevant, immaterial and unduly repetitious evidence allows for corresponding evidentiary objections at trial. One can object to any evidence on the grounds that it is irrelevant. One can likewise object to repetitive or cumulative evidence of the same fact. For example, if two experts are provided to offer the same opinion, one can object to the testimony of the second witness as "cumulative." Sometimes after such an objection, an ALJ will politely let the lawyers know that she gets the point, an indication that it may be time to move on. The remainder of section 120.569(2)(g) that permits "all other types of evidence commonly relied upon" is very broad. There are, however, limitations on its breadth provided by other sections of chapter 120 and case law.

B. Similar Fact Evidence of Prior Violations

One limitation is found in section 120.57(1)(d), Florida Statutes, which provides the following regarding evidence of previous violations or bad acts:

> Notwithstanding s. 120.569(2)(g), similar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity. When the state in an administrative proceeding intends to offer evidence of other acts or offenses under this paragraph, the state shall furnish to the party whose substantial interests are being determined and whose other acts or offenses will be the subject of such evidence, no fewer than 10 days before commencement of the proceeding, a written statement of the acts or offenses it intends to offer, describing them and the evidence the state intends to offer with particularity. Notice is not required for evidence of acts or offenses which is used for impeachment or on rebuttal.

§ 120.57(1)(d), Fla. Stat. (2017). This provision creates helpful trial objections in disciplinary or penal proceedings. It can also support motions in limine prior to trial. When a state agency seeks to elicit testimony or offer other evidence of prior offenses in its case-in-chief, it must follow the procedures of this section by providing 10-days' written notice of the acts or offenses it intends to offer. If an agency fails to follow this procedure prior to offering such evidence, it is appropriate to object to such evidence on the grounds that prior notice was not given.

C. Hearsay and the Residuum Rule

By far the most common and controversial limitation on the Any Evidence Rule has to do with hearsay evidence and the closely-related "Residuum Rule." Hearsay evidence is admissible, but will not support a finding of fact on its own unless an exception to the hearsay rule is identified during the hearing.[1] Section 120.57(1)(c) provides:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evi*dence, but i*t shall not be sufficien*t in itself to support a finding unless it would be admissible over objection in civil actions.*

§ 120.57(1)(c), Fla. Stat. (2017). The uniform rules of procedure further provide:

> Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evid*ence falls within an exception to the hearsay rule as found i*n Chapter 90, F.S.

Fla. Admin. Code. R. 28-106.213(3). These provisions provide a backdoor entry of the Florida Evidence Code's hearsay provisions into administrative proceedings. While the Any Evidence Rule admi[t]s a broad range of evidence that is inadmissible in civil trials, hearsay is only admissible if it supports or explains some non-hearsay evidence, falls into an exception to the h*ea*rsay rule under chapter 90, or, as one court put it, is supported by some "residuum" of evidence that is *admissibl*e in a civil trial:

> The basic residuum rule seems to go this way: even though all evidence may be "admissible" in an administrative context (hence no objection is necessary), the fact finder's ruling must be grounded in a "residuum" of evidence that would be admissible in a jury trial. See generally, J. Lawrence Johnston, Admissibility and Use of Evidence in Formal Admin*istrative Proceedings: An Alternative Possibility for Change,* 65 Fla. B.J. 63 (March 1991). Even though there may have been no objec*tion, ind*eed no mention of the i*nadmissibility of evidence, the hearing officer is bound to decide the* case by sifting through the evidence to find a residuum of satisfactory admissible evidence.

Bellsouth Advert. & Pub. Corp. v. Unemployment Appeals Comm'n, 654 So. 2d 292, 295 (Fla. 5th DCA 1995). Even if hearsay enters the record without objection, an ALJ generally cannot rely on hearsay to form a finding of fact except to bolster non-hearsay admissible evidence.2 Does the residuum rule sometimes leave litigants in the dark about evidentiary rulings after the record has closed? Yes. The residuum rule has been criticized for this reason:

> In light of Florida's statutory limitations on the use of hearsay in administrative proceedings, it does not make sense that a litigant should have to pile up his evidence before an inscrutable referee or hearing officer as though making an offering to a silent and possibly angry god, not knowing what is deemed hearsay or not hearsay, not knowing what "might" be deemed admissible over objection, depending on whether it is determined there is evidence for it to supplement or explain—until the hearing

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> officer issues his or her final order. By then it is too late.

Id. at 297.

How does one avoid the angry god conundrum described by the Fifth District Court of Appeal in Bellsouth? The best practice is to note your opponent's hearsay on the record at the time it is submitted. Likewise, if you believe evidence you are submitting meets a hearsay exception, it is best to argue for a hearsay exception and ask for a ruling on the record. In an administrative hearing I recently participated in, the ALJ described and recommended the following practice:

> As you know—I think everybody here is fairly experienced in the area—hearsay is admissible in this proceeding to supplement or explain other non-hearsay evidence, though not sufficient in itself to support a finding unless it would be admissible over objection in a civil trial. Therefore, I intend to admit evidence that may be hearsay unless it's otherwise irrelevant or objectionable for some other reason. If you want to make sure that the record is clear, feel free to object on the basis of hearsay, just a one-word objection will be sufficient. I will, in all likelihood, unless it's accompanied with a relevance or some other objection, I will—I will introduce the evidence. However, if either party believes some hearsay evidence is subject to an exception to the hearsay rule under 90.803, then go ahead and make your argument, and we will deal with that at that time.

Dep't. of Bus. & Prof'l Reg. v. Hamilton Downs Horsetrack, LLC, DOAH Case No. 15-3866, Final Hearing Transcript, p. 8 (May 26, 2017), rejected (DBPR Aug. 24, 2016), rev'd, Hamilton Downs Horsetrack LLC v. Dep't. of Bus. & Prof'l Reg., 226 So. 3d 1046 (Fla. 1st DCA 2017). After a hearsay objection, the court is likely to "note the hearsay" for the record and quickly move on. Since the hearsay will in all likelihood be admitted, lengthy arguments over objections should be avoided unless one is arguing for a hearsay exception.

If hearsay is determined to be admissible as an exception to the hearsay rule, it can be used on its own to support a finding of fact. The benefit of arguing for a hearsay exception at the time the hearsay is offered is that the ALJ's ruling on the hearsay exception will become part of the record. With all the hearsay exceptions noted on the record, one can draft post-trial briefs with full knowledge of which hearsay evidence is admissible on its own and which hearsay evidence is not, thereby avoiding the angry god conundrum in *Bellsouth*.

The law on hearsay is well developed and too vast to cover comprehensively here.[3] However, a couple of points are worth mentioning.

First, not all out-of-court statements meet the definition of hearsay. Section 90.801(1)(c), Florida Statutes, defines hearsay as, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Out-of-court statements offered for purposes other than proving the matter asserted are excluded from the definition of hearsay. Such statements are admissible if relevant and not otherwise excluded.[4] Two common types of out-of-court statements excluded from the definition of hearsay are prior inconsistent statements and statements offered to show state of mind. These two often overlap. For example, a prior statement of a witness could be offered to prove at what point in time the witness became aware of a particular fact. If the prior statement is inconsistent with the witness's testimony, it could also be offered as a prior inconsistent statement. The practical effect of these exclusions is that at trial, rather than arguing for a hearsay exception, one should argue these statements fall outside the definition of hearsay because they are not being offered to prove the content of the statements.

Second, a few hearsay exceptions occur often enough to warrant further discussion. The exceptions to the hearsay rule come into play when the statement offered is not excluded from the definition of hearsay. In these instances, the statement offered meets the definition of "hearsay" provided in section 90.801(1)(c), but falls under an exception provided in sections 90.803 or 90.804, Florida Statutes.

Two common hearsay exceptions in administrative proceedings are business records and party admissions. A business record is defined as:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration . . .

§ 90.803(6)(a), Fla. Stat. (2017). When offering a document as a business record it is necessary to lay a foundation by presenting evidence that the requirements of section 90.803(6) have been met. The usual method is to call the record custodian as a witness.[5] However, in order to reduce costs and inconvenience, the rule permits foundation by certification or stipulation. If offering a certified document, it is necessary to follow the procedures provided in 90.803(6). In a complex case with sophisticated parties, it is not uncommon for the parties to exchange exhibits well ahead of hearing and stipulate to the authenticity of the exhibits while preserving all other evidentiary objections.

The other common hearsay exception is a party admission, which is defined as:

> A statement that is offered against a party and is:
>
> (a) The party's own statement in either an individual or a representative capacity;
>
> (b) A statement of which the party has manifested an adoption or belief in its truth;
>
> (c) A statement by a person specifically authorized by the party to make a statement concerning the subject;

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> (d) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship; or
>
> (e) A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

§ 90.803(18)(a)-(e), Fla. Stat. (2017). This hearsay exception does not require that the statement be made against interest, although the exception (called "admissions") is commonly referred to that way. Professor Ehrhardt notes that referring to this exception as "admissions against interest" is misleading and suggests that "[a] more precise term for the exception is 'statement by a party opponent,'" because this exception does not require that the statement be against interest.[6] The key to this hearsay exception is that the admission must be made by an adverse party.[7] Statements from non-party declarants are not admissible under this exception. The rationale for this exception is that since the declarant is a party, the party has not been deprived of the opportunity to cross-examine itself.[8]

The usual method to admit a party admission is by offering a deposition transcript. A deposition of a party taken in an administrative proceeding is admissible against the party at final hearing because it would be admissible over objection in a civil trial.[9] Non-deposition statements, such as emails, can also be admissible under this exception.[10]

II. Pre-hearing Orders

As provided in *Florida Industrial Power Users Group,* though the Florida Evidence Code does not strictly apply at DOAH, ALJs have the discretion to apply the Evidence Code. When might an ALJ exercise such discretion? An ALJ is more likely to fall back on the Evidence Code in complex cases with sophisticated parties. Such discretion usually takes the form of a pre-hearing order providing for additional evidentiary or procedural requirements. For example, DOAH uses similar, standardized orders of pre-hearing instructions in certificate of need cases.[11] These orders require, among other things, that experts have formulated their opinions by the time of their depositions and bring to their depositions all material on which they relied to form their opinions, which allows opposing counsel to elicit the expert's entire opinion at the deposition. This requirement has the effect of creating a new trial objection. If at trial an expert veers into an opinion that was not offered in the deposition, one can move to strike such testimony on the grounds that it violates the order of pre-hearing instructions. One can make the same objection if an expert offers supporting documents that were not provided at the expert's deposition.

The standard pre-hearing order issued in most cases does not provide additional evidentiary requirements. However, any party can request an ALJ to issue a prehearing order "to ensure a just, speedy, and inexpensive determination of the proceeding." § 120.569(2)(o), Fla. Stat. (2017). The statute specifically requires an order establishing a discovery period, including a deadline by which all discovery shall be completed, and the date by which the parties shall identify expert witnesses and their opinions. However, many ALJs will accommodate requests for additional requirements.

III. Official Recognition

Official recognition is the administrative equivalent of judicial notice in a civil proceeding. Section 120.569(2)(i) permits parties to request "official recognition" of a matter and permits opposing parties to contest a request for official recognition. Rule 28-106.213(6) provides that a request for official recognition should be by motion and that the motion "shall be considered in accordance with the provisions governing judicial notice in Sections 90.201-.203, F.S."[12] In a civil proceeding, section 90.201 defines which matters must be judicially noticed, and section 90.202 provides which matters may be judicially noticed.

Official recognition should be requested before or during the final hearing, so that whatever is officially recognized becomes part of the record. The First District Court of Appeal has rejected an agency's attempt to reopen the record to officially recognize matters that were not officially recognized in the record at DOAH,[13] so it is unlikely a request for official recognition will be granted after DOAH has relinquished jurisdiction back to the agency.

IV. Expert Testimony

As noted in part I of this article, an ALJ's decision to accept the testimony of one expert witness over another expert's testimony is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of competent substantial evidence of record supporting this decision. *See Collier Med. Ctr. v. Dep't of Health & Rehab. Servs.*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utilities Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). The case law is less clear as to what standard is applicable, if one is applicable at all, to determine the reliability or weight of expert testimony in an administrative hearing.[14]

The rules of evidence governing expert testimony in civil trials are in sections 90.701 - 90.706, Florida Statutes. A plain reading of the Any Evidence Rule indicates that ALJs have the discretion to accept expert testimony "whether or not such evidence would be admissible in a trial in the courts of Florida." However, as held in *Florida Industrial Power Users Group*, administrative tribunals have the discretion to apply the Florida Evidence Code. Given this unclear evidentiary environment, in complex cases with extensive expert testimony, it is likely the best practice to request a pre-hearing order, or to

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stipulate to an order, clarifying the rules applicable to expert testimony. For example, one can request a discovery order that the parties identify in advance all experts expected to testify, that all such experts provide their entire opinion at deposition, and that all documents supporting the opinion be provided prior to the deposition. With such an order, litigants should have all the discovery necessary to propound and attack expert opinions at trial.

Given the holding in *Florida Industrial Power Users Group,* one could, in theory, also request an order, or stipulate to an order, making effective the rules of evidence regarding reliability of expert testimony, so that the parties would know in advance the evidentiary standard for admissibility of expert testimony. However, ALJs have the discretion whether to grant such a request.

When offering expert opinion testimony, it is appropriate to lay a foundation by eliciting the expert's qualifications to offer the opinion and the facts or data on which the expert opinion is based. It is not necessary to proffer a witness as an expert in a particular area, and an ALJ is under no obligation to announce at trial whether an expert is qualified. However, in complex cases with many experts, it may be prudent to make such proffers to create a clear record. Even if no proffer has been made, it is still appropriate to lay the proper foundation, because the witness's qualifications add to the weight of her testimony. At trial, it is not uncommon to hear a relevance objection to a question seeking to elicit a witness's qualifications or background. The proper response to such an objection is that the witness's background is admissible as going to the weight of the witness's testimony. As noted earlier, determining the weight of evidence is within the purview of the ALJ.[15]

V. Privilege

The rules of privilege apply to the same extent as in civil actions under Florida law. *See* Fla. Admin Code R. 28-106.213(4).

VI. Competent Substantial Evidence

As noted in the introduction to part I of this article, findings of fact must be supported by "competent substantial evidence." *See* §§ 120.57(1)(*l*) and 120.68(7)(b), Fla. Stat. (2017). Do Florida courts offer any additional guidance on what is and what is not "competent substantial evidence" in an administrative hearing? The answer is not very much.[16] The usual citation is to the following language from *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957):

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *Becker v. Merrill*, 155 Fla. 379, 20 So. 2d 912; *Laney v. Board of Public Instruction*, 153 Fla. 728, 15 So. 2d 748. In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. *Jenkins v. Curry*, 154 Fla. 617, 18 So. 2d 521. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent."

The broad language in *De Groot* does not easily translate into a practical rule. However, the feeling of many administrative practitioners is that it is an exceedingly rare occurrence—if it has ever happened at all—for a district court of appeal to review a DOAH record on appeal, find that there is admissible evidence in the record that supports the reviewed finding of fact, but then hold that the evidence is not competent or substantial, thus reversing the finding of fact. Rather, in administrative proceedings, the competent substantial evidence rule really means that if a finding of fact is supported by *any* admissible evidence (irrespective of any analysis under *De Groot* and its progeny), such finding of fact is not likely to be second-guessed by a reviewing court.

Conclusion

Florida administrative law is a vast practice area with many complex issues. I have relied often on articles in this newsletter to guide me through these issues. I hope this article offers similar help to new practitioners.

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Endnotes:

[1] Exceptions that would allow hearsay to be admitted over objection in civil actions are found in the Florida Evidence Code, chapter 90, Florida Statutes. *See, e.g.*, §§ 90.801, 90.803, and 90.804, Fla. Stat. (2017).

[2] *See Scott v. Dep't. of Bus. & Prof'l Reg.,* 603 So. 2d 519 (Fla. 1st DCA 1986); *Harris v. Game & Fresh Water Fish Comm'n,* 495 So. 2d 806 (Fla. 1st DCA 1986). *But see Tri-State Systems, Inc. v. Dep't of Transp.,* 500 So. 2d 212 (Fla. 1st DCA 1986) ("Unobjected-to hearsay . . . [is] usable as proof just as any other evidence."); S. Brent Spain and Gregg Riley Morton., *Fla. Administrative Practice*, 10th Edition, §4.36. For a deeper discussion of the case law regarding the residuum rule, *see id.* at §§ 2.52, 4.36. Though the case law is a bit muddled, the greater weight of the case law appears to support this statement at this time. *See e.g., Sunshine Chevrolet Oldsmobile v. Unemployment Appeals Comm'n,* 910 So. 2d 948, 951 (Fla. 2d DCA 2005) (holding that the absence of an objection to hearsay does not foreclose a referee of the Unemployment Appeals Commission from determining that admitted documents were not within the scope of the business records exception and

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thus insufficient to support a finding of fact; declining to extend the holding in *Tri-State Systems*).

[3] *See* Charles W. Ehrhardt, *Ehrhardt's Florida Evidence,* § 801.1 et. seq. (2017 ed.).

[4] *See id.* §§ 801.4 - 801.9.

[5] For a deeper analysis of these requirements, *see id.* § 803.6.

[6] *See id*. § 803.18.

[7] This exception is also to be distinguished from the former testimony exception in section 90.804(2)(a). The former testimony exception provided by section 90.804(2)(a) requires a showing that the declarant is unavailable. *See Grabau v. Dep't of Health*, 816 So. 2d 701 (Fla. 1st DCA 2002). However, a party admission exception under section 90.803(18) is admissible regardless of the availability of the declarant.

[8] *See Ehrhardt's Florida Evidence* § 803.18.

[9] *See Warner v. Reiss*, 623 So. 2d 777 (Fla. 1st DCA 1993)

[10] *See GTO Inc. v. Unemployment Appeals Comm'n*, 783 So. 2d 1201 (Fla. 1st DCA 2001).

[11] This practice began with the issuance of a model order of pre-hearing instructions from then ALJ Charles A. Stampelos (now Magistrate Judge for the United States District Court for Northern District of Florida, Tallahassee Division). An example may be found in *Osceola Regional Hosp., Inc. v. Agency for Health Care Admin,* DOAH Case No. 06-2811CON (Order of Pre-Hearing Instructions, Oct. 3, 2006).

[12] On its face, this rule appears to adopt the Florida Evidence Code provisions governing judicial notice. However, *Florida Industrial Power Users Group* could be construed to overrule this rule to the extent that the rule limits an ALJ's evidentiary discretion provided in that case. Chapter 120 does not offer further guidance on what matters must and may be officially recognized, so the door may be open for an ALJ to exercise discretion in this area.

[13] *See Lawnwood Medical Center, Inc. v. Agency for Health Care Admin.,* 678 So. 2d 421 (Fla. 1st DCA 1996), *review denied,* 690 So. 2d 1299 (Fla. 1997).

[14] The standard for reliability of expert testimony provided in section 90.702, Florida Statutes is currently in doubt. In 2013, the Florida Legislature adopted the *Daubert* standard. Though adopted by the Legislature, the *Daubert* amendment has not been adopted by the Florida Supreme Court "to the extent that it is procedural, due to constitutional concerns raised, which must be left for a proper case or controversy." *In re Amendments to Florida Evidence Code,* 210 So. 3d 1231 (Fla. 2017). *See also Ehrhardt's Florida Evidence,* §702.3.

[15] *See Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

[16] The competent substantial evidence standard is more developed in other contexts, for example in review of the suspension of a driver's license in DUI cases. *See e.g., Wiggins v. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1166 (Fla. 2017).

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