Administrative Law Section Newsletter

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The 2010 Amendments to the APA: Legislature Overrides Veto of Law to Require Legislative Ratification of "Million Dollar Rules"

by Lawrence E. Sellers, Jr.

During the 2010 Regular Session, the Florida Legislature approved a measure, HB 1565, making several changes to the Florida Administrative Procedure Act (APA). The June issue of this Newsletter contains a summary of these changes.[1] One of the most significant changes requires that administrative rules with a "million dollar" impact may not take effect until ratified by the Legislature. Governor Crist vetoed the bill, claiming that it "encroaches upon the principle of separation of powers"[2] and that if the bill became law, "nearly every rule would have to await an act of the Legislature to become effective. This could increase costs to businesses, create more red tape, and potentially harm Florida's economy." On November 16, 2010, the Legislature voted to override the veto.[3]

When it voted to override the veto of HB 1565, the Legislature also passed a joint resolution setting the effective date as the following day, November 17, 2010.[4] This then raised

See "Amendments to the APA," page 6

DBPR's New Streamlined Due Process: A Violation of Rights or Wave of the Future?

by Bonnie Wilmot

Individuals holding licenses issued by the Department of Business and Professional Regulation (DBPR) will no longer find a process server at their doors before those licenses can be sanctioned by the agency. Holders of professional licenses requiring qualifications and subject to revocation have long been afforded due process protections, including notice requirements as set forth in section 120.60(5), Florida Statutes.[1] During the 2010 legislative session, however, DBPR proposed and the legislature passed an amendment to section 455.275, Florida Statutes, giving DBPR the ability to forego personal service of administrative complaints.

See "Due Process," page 7

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APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Friends of Perdido Bay, Inc. v. Dep't of Envtl. Prot., 44 So. 3d 650 (Fla. 1st DCA 2010) (Opinion filed September 22, 2010)

International Paper Company appealed a final order of the Department of Environmental Protection denying a wastewater permit. Friends of Perdido Bay, Inc., a prevailing party in the administrative proceeding, filed a cross appeal challenging the constitutionality of Section 403.088, Fla. Stat. International Paper then voluntarily dismissed its appeal. Friends of Perdido Bay argued that the court should continue to consider its arguments on the constitutional issue despite the permit applicant's dismissal of its appeal. It cited *Save Anna Maria, Inc. v. Department of Environmental Protection*, 700 So. 2d 113 (Fla. 2d DCA 1997), as support.

The court dismissed Friends' cross appeal. It held that Friends was not adversely affected under Section 120.68, Fla. Stat., by the decision below as it had sought denial of the permit and was successful in that regard. The court distinguished *Save Anna Maria* as it involved a situation where the Department had rejected an administrative law judge's findings of fact in the final order. In this case, the Department simply adopted the recommended order.

Florida Elections Comm'n v. Valliere, 45 So. 3d 506 (Fla. 4th DCA 2010) (Opinion filed September 15, 2010)

Susan and James Valliere cross appealed a final order of the administrative law judge finding each of them guilty of one or more election law violations. On appeal, they argued that the term "hearsay" in Section 106.25(2), Fla. Stat., had been too broadly construed by the judge. That section requires that sworn complaints submitted to the Florida Elections Commission must be based on "personal information or information other than hearsay." The Vallieres argued that the term should be given the same definition as set forth in the Florida Evidence Code. Thus, they argued that the Commission should not rely on a campaign treasurer's report in conducting its investigation.

The court agreed with the administrative law judge that the Vallieres' construction of the term was too narrow and would result in the Commission being prevented from investigating reasonable complaints. It concluded that the Legislature had intended to use the term in its plain and ordinary meaning as an item of idle or unverified information.

SSA Security, Inc. v. Pierre, 44 So. 3d 1272 (Fla. 1st DCA 2010) (Opinion filed October 7, 2010)

The Commission on Human Relations issued a "Final Order Awarding Affirmative Relief from an Unlawful Employment Practice." The order found that SSA Security had engaged in unlawful employment practices and that Pierre was entitled to back pay in a specific dollar amount for each 40-hour week from September 5, 2006 to the date of the order; offset by other compensation earned by Pierre during that time frame. The order further provided that the parties were to agree to the total settlement amount or the matter would be remanded to the administrative law judge for determination of the final amount of back pay owed.

SSA appealed the order. On appeal, the court dismissed on the grounds that the order was not actually final.

Licensing

Kaplan v. Dep't of Health, 45 So. 3d 19 (Fla. 1st DCA 2010) (opinion filed July 23, 2010)

Kaplan, a physician, appealed the emergency suspension of his license by the Department of Health. He argued that the emergency order failed to meet the criteria of Section 120.60(6), Fla. Stat. The court reversed. It noted that the appellate review was limited to the face of the order itself, which must contain sufficient factual allegations to demonstrate that the conduct at issue is likely to continue, that the order is necessary to stop the emergency circumstances and that the order is sufficiently narrow. In this case, the order simply alleged certain conduct by Kaplan relating to one patient that

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

Cathy M. Sellers (csellers@broadandcassel.com) ..... **Chair**
Allen R. Grossman (a.grossmans@mgfblaw.com) ..... **Chair-elect**
F. Scott Boyd (boyd.scott@leg.state.fl.us) ..... **Secretary**
Amy W. Schrader (aschrader@gray-robinson.com) ..... **Treasurer**
Amy W. Schrader (aschrader@gray-robinson.com) ..... **Editor**
Jackie Werndli, Tallahassee (jwerndli@flabar.org) ..... **Program Administrator**
Colleen P. Bellia, Tallahassee (cbellia@flabar.org) ..... **Layout**

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had occurred three years before entry of the order.

Withers v. Blomberg, 41 So. 3d 398 (Fla. 2d DCA 2010) (Opinion filed August 4, 2010)

The Commissioner of Education filed an administrative complaint against Withers, a teacher in the Pasco County school district. The complaint alleged that Withers had attempted to commit suicide on the school property and that the incident occurred in front of students and other faculty members. Following an administrative hearing, the administrative law judge entered a recommended order finding that Withers had attempted to take her life on school property, but that it did not occur in front of students or faculty. The ALJ recommended that Withers be found guilty of misconduct and be placed on two years probation. The ALJ rejected the Superintendent of Schools' request that Withers also be required to participate in the Recovery Network Program ("RNP"). No exceptions were filed. The recommended order was submitted to the Education Practices Commission ("EPC") for consideration.

At the final hearing before the EPC, the Commissioner requested that the recommended order be modified to require participation in the RNP. Withers noted to the EPC that the recommended order did not contain such a requirement but she did not argue that the EPC was precluded from making such a modification on the grounds that no exceptions were filed. The EPC's order included the requirement that Withers participate in the RNP.

On appeal, the court reversed and remanded. The court noted that an administrative agency may increase a proposed penalty where it reviews the complete record and states with particularity the reasons for doing so. In this case, the court held that it was not clear from the transcript of the EPC hearing whether the members reviewed the entire record. Moreover, the order of the EPC failed to cite to the record in supporting the increased penalty. The court concluded that the EPC's failure to comply with procedural requirements deprived Withers of due process. Therefore, it held that Withers could raise the issue on appeal despite her failure to object at the EPC hearing.

Declaratory Statements

ExxonMobil Corp. v. Dep't of Agric. & Consumer Servs., 2010 WL 4273192 (Fla. 1st DCA 2010) (Opinion filed October 29, 2010)

ExxonMobil sought a declaratory statement from the Department of Agriculture and Consumer Services on several issues involving interpretation of Section 501.160, Fla. Stat. (the Price Gouging Act). Specifically, ExxonMobil asked that the Department state whether its use of a regional price index, along with 15 other wholesale gasoline distributors, fell within language in the statute that allowed cost increases based on "national or international market trends" and whether the statute could be enforced against wholesale, as opposed to retail, distributors.

The Department dismissed the request for a declaratory statement on the grounds that there were 15 other entities whose circumstances would be addressed by the statement. In addition, the Department had issued subpoenas to ExxonMobil relating to pricing issues and concluded that such issuance precluded issuance of a declaratory statement.

On appeal, the court reversed. Citing *Department of Business & Professional Regulation v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999), the court held that the Department had too narrowly construed the declaratory statement provisions of the Administrative Procedure Act. It noted that the Florida Supreme Court in the *Investment Corp.* case had recognized that it would be extremely rare for a declaratory statement to address circumstances unique to a single party. Moreover, the court held that the issuance of subpoenas was not sufficient to allow dismissal of the request for a declaratory statement. While the court recognized that a declaratory statement should not be issued where it would address issues being decided in litigation, in this case, there was no litigation as the Department had simply initiated an investigation.

Appeals

AmeriLoss Public Adjusting Corp. v. Lightbourn, 46 So. 3d 107 (Fla. 3d DCA 2010) (Opinion filed October 6, 2010)

Lightbourn retained AmeriLoss Public Adjusting Corporation on January 4, 2007, to recover monies under a supplemental claim on Lightbourn's property insurance policy for damages caused by Hurricane Katrina. The agreement provided, inter alia, that AmeriLoss would be entitled to 33 1/3% of any supplemental claim recovered. Subsequently, Lightbourn disputed AmeriLoss' entitlement to that amount on the grounds that the Department of Financial Services had adopted a rule on September 3, 2006, limiting recovery by public adjusters to 10% of the amount recovered for an insured. Lightbourn initially inquired of the Department whether the agreement with AmeriLoss complied with the rule. The Department responded to Lightbourn that the rule applied only to storms resulting in an emergency declaration by the Governor after the adoption date of the rule. Lightbourn then filed a request for a declaratory statement posing the question of whether AmeriLoss was entitled to recover 33 1/3% of the supplemental claim amount under the agreement.

The Department published notice of its receipt of a request for a declaratory statement; however, the notice did not refer to AmeriLoss. It stated that Lightbourn had sought a declaratory statement on whether an agreement entered into by a Florida public adjustor that violated the rule provisions was valid and whether a public adjustor was entitled to a fee in excess of the 10% allowed by rule. The Department issued a declaratory statement holding that the agreement was subject to the rule and that AmeriLoss had prior notice that fees in excess of 10% were not allowable under the rule. AmeriLoss did not seek to participate as a party to the declaratory statement proceeding.

AmeriLoss appealed the declaratory statement pursuant to Section 120.68, Fla. Stat. The Department sought to have the appeal dismissed on the grounds that AmeriLoss was not a party below. AmeriLoss argued

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that it did not receive personal notice of the request for a declaratory statement and was not aware of the proceeding.

The court dismissed the appeal. It held that AmeriLoss was not entitled to personal notice of the request for a declaratory statement. The only notice required was publication in the Florida Administrative Weekly. The court held that only a party to the proceeding below is entitled to appeal a final order pursuant to Section 120.68.

Public Records

James, Hoyer, Newcomer, Smiljanich & Yanchunis, P.A. v. Rodale, Inc., 41 So. 3d 386 (Fla. 1st DCA 2010) (Opinion filed July 30, 2010)

Rodale, Inc., a vendor of books and magazine subscriptions, produced over 5000 documents to the Department of Legal Affairs, Office of the Attorney General ("AG") as part of an investigation into Rodale's sales practices. In producing the documents, Rodale identified them as trade secrets and exempt from the Public Records Act. The James law firm, a self-described consumer protection investigative law firm, sought disclosure of the documents.

The trial court determined that the documents, which it characterized as customer lists or containing information derived from customer lists, vendor contracts, and marketing and product development documents, were trade secrets and enjoined disclosure of the documents by the AG.

On appeal, the district court affirmed except as to as limited number of documents. Specifically, the appellate court held that customer complaints and Rodale's responses to those complaints were public records. The court agreed that customer lists, which are bought and sold, are trade secrets. However, while recognizing that customer complaints might contain some information, such as names, addresses, and product information, that are a subset of what is available from customer lists, the court held that complaints and responses thereto are not trade secrets.

Department of Health v. Poss, 45 So. 3d 510 (Fla. 1st DCA 2010) (Opinion filed September 22, 2010)

The Department of Health filed an administrative complaint against Dr. Poss, a podiatrist, alleging failure to practice medicine with a level of care and skill recognized by a reasonably prudent physician. Poss requested an administrative hearing to challenge that complaint. During the course of discovery, counsel for Poss sought to obtain certain documents from the Department's expert witness that included confidential information from the Department's investigations of other physicians where no probable cause finding had been made. The Department filed a motion to quash. The administrative law judge ordered that certain records be produced by the expert, including opinion letters written by the expert to the Department related to standard of care and treatment.

The Department took an interlocutory appeal challenging that order. On appeal, the court reversed as to any documents that related to a Department investigation of a physician other than Dr. Poss where the investigation did not result in a probable cause finding. The court noted that Section 456.073(1), Fla. Stat., provided an exemption from the Public Records Act for information obtained in the course of an investigation by the Department until 10 days after a finding of probable cause or until the waiver of confidentiality by the physician being investigated. While the court concluded that the statutory exemption did not create an absolute bar to confidential documents being discovered in litigation, it held that the rights of physicians to confidentiality of investigative records outweighed the need of Dr. Poss to the confidential records. In particular, the court found that other documents and information available to Dr. Poss were adequate to allow his counsel to question the Department's expert witness.

Statutory Construction

Trust Care Health Servs. v. Agency for Health Care Admin., 2010 WL 3893978 (Fla. 3d DCA 2010) (Opinion filed October 6, 2010)

Trust Care Health Services applied to the Agency for Health Care Administration (AHCA) for a change in ownership of a home health agency when Roberto Marrero acquired all of the stock of the company. AHCA denied that application on the grounds that Marrero had previously held the controlling interest in another company, All Med Network Corporation, which had been terminated from the Medicare program and had its license revoked for site-visit deficiencies. AHCA cited Section 408.815(1)(a) and (c), Fla. Stat., which provide that AHCA can deny a license application where there is a false representation in the application or where the controlling interest has been terminated from participation in the Medicare program.

In the change of ownership application, AHCA asked whether the applicant, owner or any person having 5% or more financial interest in the applicant was ever terminated from the Medicare program or was found to have violated the standards applicable to home health care licensure. Marrero responded "no" to both questions. When AHCA questioned the application responses, Marrero's counsel responded that Marrero was never personally held responsible for violations or terminated from Medicare and was merely a former administrator for All Med. The stipulated facts indicated that Marrero was a vice president for All Med, but owned no stock in that company.

Trust Care requested an informal hearing. AHCA's internal administrative law judge considered stipulations of fact from the parties and an affidavit from a deputy secretary of AHCA. The affidavit stated that the affiant had been involved in the drafting of health care statutes, including Section 408.815, and that the purpose of the statute was to deny a license where the controlling interest of an applicant was the former controlling interest of another entity who had been terminated from Medicare. The administrative law judge entered a recommended order that adopted AHCA's position.

On appeal, the majority affirmed the final order of AHCA. It held that the starting point of its analysis was the deference owed to the agency's interpretation of laws within its area of expertise. Therefore, AHCA's order could not be reversed unless it was clearly erroneous.

Judge Cope dissented. He opined that the correct analysis must start with the clear and unambiguous language of the statute. The statute required that the owner (Trust Care) and the controlling interest (Marrero) disclose whether there had been a termination of Medicare participation. Trust Care had never been terminated and Marrero, personally, had never been terminated. Judge Cope apparently concluded that Marrero was not a controlling interest in All Med.

Mary F. Smallwood is a partner with the firm of GrayRobinson, P.A. in its Tallahassee office. She is Past Chair of the Administrative Law Section and a Past Chair of the Environmental and Land Use Law Section of The Florida Bar. She practices in the areas of environmental, land use, and administrative law. Comments and questions may be submitted to mary.smallwood@gray-robinson.com.

Agency Snapshot

Florida Department of State

by Daniel E. Nordby

The Office of the Secretary of State was created under the Florida Constitution in 1845 as the keeper of the Great Seal of the State of Florida and the custodian of the Laws of Florida. In addition to these responsibilities, the Secretary of State today serves as Florida's Chief Election Officer and, as head of the Department of State, which oversees the Divisions of Corporations, Cultural Affairs, Historical Resources, and Library & Information Services.

The Department of State's Division of Library and Information Services may be best known to administrative law practitioners as the filing point for rules promulgated by state agencies; as the publisher of the Florida Administrative Weekly and Florida Administrative Code; and the operator of the *www flrules.org* website.

Head of the Agency:
Dawn Roberts, Interim Secretary
R. A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399-0250

Dawn Roberts was appointed Interim Secretary of State effective May 3, 2010. Prior to her appointment, Ms. Roberts served as Assistant Secretary of State and Chief of Staff to Secretary Kurt Browning, Director of the Division of Elections during the 2004 and 2006 election cycles, and the Department's General Counsel from August 2003 to June 2004.

Agency Clerk:
Charlotte Wheeler
R. A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399-0250
Phone: (850) 245-6536

General Counsel:
C.B. Upton

Number of lawyers on staff: 5

Kinds of Cases:
Approximately 75-80% of the Department's cases involve litigation over campaign finance and election law matters. The remaining 20-25% of cases include constitutional challenges in which the Department is a named defendant and various matters arising out of the Department's Divisions of Corporations, Cultural Affairs, Historical Resources, or Library & Information Services. The Florida Administrative Procedure Act is implicated in approximately 10-15% of the Department's cases.

Practice Tips:
As with most agencies, the attorneys in the Department's Office of the General Counsel are each assigned a portfolio of legal issues arising from different divisions within the Department. To be most effective in representing clients before the agency, ensure that you are speaking with the right attorney. The Department's attorneys are easily reachable, which is particularly important given the time-sensitive nature of many of the Department's election law cases.

Public records requests should be sent to the Department's Public Information Director:

Jennifer Krell Davis
Florida Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399-0250
(850) 245-6527
Email: JKDavis@dos.state.fl us

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the question of whether the new law, including the requirement that certain rules may become effective only if ratified by the Legislature, applies to pending rulemaking. The Joint Administrative Procedures Committee promptly issued a memorandum advising that "[p]roposed agency rules that have not been filed for adoption, and proposed rules that have been filed for adoption but are not yet effective, as well as proposed rules noticed on or after the effective date of [HB 1565] appear to be subject to the new legislation."[5] The memorandum then requested that agencies advise the committee whether their rules require Legislative ratification. It appears that at least one agency has determined that the new law applies to pending rulemaking and will result in a delay in the effective date of these rules.[6]

Legislative ratification is not new to Florida,[7] but the implementation of HB 1565 raises a number of other interesting questions, including: at what stage of the rulemaking process may these rules be submitted for ratification; whether such rules continue to be subject to legal challenges provided by the APA; and what process will the Legislature use to consider whether to ratify these rules? The resolution of these and other questions may well require further legislative action when the Legislature convenes in March. So stay tuned.

Endnotes

[1] *See* Lawrence E. Sellers, Jr., *The 2010 Amendments to the APA: Governor Vetoes Bill that Would Require "Million Dollar Rules" to be Ratified by the Legislature*, Administrative Law Section Newsletter, Vol. XXXI, No. 4 (June 2010).

[2] *But see SWFWMD v. Save the Manatee Club, Inc.*, 773 So.2d 594, 598 (Fla.1st DCA 2000) ("Rulemaking is a legislative function, and as such, it is within the exclusive authority of the Legislature under the separation of powers provision of the Florida Constitution.")

[3] *See* Art. III, s. 8(c), Fla. Const. (if each house shall, by a two-thirds vote, re-enact the bill, it shall become law, the veto notwithstanding). HB 1565 is now codified at Chapter 2010-279, Laws of Florida.

[4] HJR 9-A (2010) (HB 1565 shall take effect November 17, 2010, the veto of the Governor notwithstanding).

[5] *See* Memorandum, dated November 17, 2010, from Scott Boyd, Executive Director & General Counsel, Joint Administrative Procedures Committee, to Agency Heads and General Counsels. The memorandum cites *Florida Public Service Commission v. Florida Waterworks Association*, 731 So. 2d 836 (Fla. 1st DCA 1999), and *Life Care Centers of America, Inc. v. Sawgrass Care Center, Inc.*, 683 So. 2d 609 (Fla. 1st DCA 1996).

[6] *See* Email, dated November 24, 2010, from the Board of Medicine to Interested Parties re Change in Effective Date of Pain Management Clinic Rules. *See also* Kate Howard, *New Florida Law Is Delaying Regulation of Pill Mills*, Jacksonville.com (Dec. 1, 2010); Lee Logan, *As Drug Deaths Mount, New Law Stalls Tighter State Regulation*, St. Petersburg Times (Nov. 24, 2010).

[7] For example, Section 373.421, F.S., requires legislative ratification of the methodology used to determine the landward extent of wetlands, and by Section 373.4211, F.S., the Legislature ratified the administrative rule establishing that methodology with certain changes.

***Larry Sellers** is a partner with Holland & Knight LLP, practicing in the firm's Tallahassee office.*

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Notice Requirements Under the APA

Under the APA state agencies are required to provide notice to the licensee, through either certified mail or personal service, prior to sanctioning a professional license. A signed receipt for certified mail or an affidavit of personal service provides proof that the licensee has received a copy of the administrative complaint along with notice of rights to a hearing. Section 120.60(5), Florida Statutes, provides that no "revocation, suspension, annulment, or withdrawal of any license" is lawful unless personal service is made, but provides for service by publication when personal service cannot be made. Agencies, however, must make extensive efforts to personally serve a licensee prior to relying on service by publication.[2] Statutory requirements that licensed individuals notify agencies of their current address and timely update contact information, have not kept courts from demanding that an agency follow every lead at its disposal before resorting to notice by publication.[3] When justified, publication is satisfied by running a short notice for four consecutive weeks in a newspaper in the county of the licensee's last known address or in Leon County if the licensee resides outside the state or if their county of residence has no newspaper.[4]

Licensees, however, may not avoid service of an administrative complaint to substantiate a lack of notice claim. In *Shelley v. Florida Department of Financial Services,* the First District Court of Appeal addressed the question of whether an individual could contest personal service when the receipt for certified mail was returned unclaimed but the same documents, sent by non-certified mail, reached the individual.[5] The court held that "use of mailed notice meets state and federal due process requirements in those circumstances."[6] An important factor guiding the court's decision was that the individual had actually received the administrative complaint,[7] something that generally cannot be proven without a certified mail receipt.

DBPR's New Notice Requirements

As of July 1, 2010, new notice requirements for licensees regulated by DBPR went into effect.[8] Section 455.275(3), Florida Statutes, which requires individuals licensed by the department to maintain a current mailing address, also now provides in pertinent part:

> (a) Notwithstanding any provision of law, when an administrative complaint is served on a licensee of the department, the department shall provide service by regular mail to the licensee's last known address of record, by certified mail to the last known address of record, and, if possible, by e-mail.
>
> (b) If service, as provided in paragraph (a), does not provide the department with proof of service, the department shall call the last known telephone number of record and cause a short, plain notice to the licensee to be published once each week for 4 consecutive weeks in a newspaper published in the county of the licensee's last known address of record. If a newspaper is not published in the county, the administrative complaint may be published in a newspaper of general circulation in the county. If the licensee's last known address is located in another state or in a foreign jurisdiction, the administrative complaint may be published in Leon County pursuant to s. 120.60(5).

The amendment to section 455.275 overrides section 120.60(5)'s general notice requirements by beginning the subsection with the language, "Notwithstanding any provision of law . . ." The notice requirements now applicable to administrative complaints filed by DBPR in many ways mirror those found in section 120.60(5), but there are some significant differences, including the following:

- The first and most glaring difference between the two statutes is that section 455.275(3) does not require or even mention personal service. Specifically, section 455.275(3) does not preclude sanctions against a license without personal service of the complaint, but rather provides instructions for alternate means of service or publication of an administrative complaint.
- DBPR is now required to send the administrative complaint by both certified and regular mail to the licensee's last known address of record. Section 120.60(5), however, makes no mention of utilizing the address of record, which leaves agencies subject to the judicial interpretation that the agency must pursue leads outside of department records when attempting to obtain service on a licensee.[9]
- Section 455.275(3) adds the requirement that the administrative complaint be sent not only by certified mail, but also by regular mail and email if possible. These are practical additional methods of obtaining service, particularly in light of the decision in *Shelley* providing that proof of receipt is sufficient to show proof of service.[10] The additional requirement to send the complaint via email, when possible, is a practical one given that the state increasingly utilizes email in corresponding with its licensees. Considering the fact that most people do not change their email address when they change their home address, this requirement could allow for notice to individuals the agency would have been unable to locate through traditional means.
- The jump from personal service to published service in section 455.275(3) does not include the condition that personal service was unsuccessful. Whereas section 120.60(5), in setting out conditions for published service, reads, "When personal service cannot be made,"[11] the amendment to DBPR's statute simply states, "If service, as provided in paragraph (a), does not provide the department with proof of service . . ."[12] As mentioned previously, courts have used the "could not be made" language

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651 E. Jefferson St.
Tallahassee, FL 32399-2300

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to require that reasonable efforts be made by an agency to locate an individual. Now, DBPR need only publish notice of an administrative complaint when the agency cannot obtain service through one of the various means provided in section 455.275(3), Florida Statutes.

- Section 455.275(b) includes the additional requirement that a phone call be made to the last known telephone number of record for the licensee when DBPR resorts to published notice. It is hard to imagine how a phone call, even if the licensee answers, could be considered service of notice since the requirement is that the individual be notified of not only the complaint and allegations against them, but also of their rights to a hearing under Chapter 120, Florida Statutes. One can only speculate that the phone call could result in contact and with that contact, the agency could obtain information that could be used to effectuate actual notice.

April Skilling,[13] Deputy General Counsel for DBPR, anticipates that the new law allowing for alternate means of service will be both practical and cost effective. Skilling reports that the statute has been in effect less than six months, making it a little early to tabulate results, but it appears that not only are more individuals being served but they are also being served faster. Of course, DBPR has been able to totally eliminate the expense of process servers, a cost that can range anywhere from $53 to $118 depending on location. Perhaps not surprisingly, Skilling reports a slight increase in the need for notice by publication, but also notes an increase in the number of individuals contacted and quicker settlement of most cases. This she credits to the addition of phone calls and emails to licensees.[14]

It remains to be seen whether DBPR's new notice requirements will be challenged as a violation of due process rights or whether the new requirements represent a positive change resulting in a cost-effective and streamlined system that allows for actual notice to a majority of DBPR's licensees. In any event, this is likely to be a question for the courts, one which could influence the methods of notice employed by many or all administrative agencies with jurisdiction over licensing.

Endnotes:

[1] In 1931 the Florida Supreme Court, in reviewing the case of a physician stripped of his professional license without adequate notice, recognized the right of notice to be "fundamental to the accused." *State v. Hollingsworth* 103 Fla. 801, 803 (Fla. 1931).

[2] *See Baker v. Office of the Treasurer, Dep't. of Ins.,* 575 So. 2d 727, 729 (Fla. 1st DCA 1991) (holding that the agency failed to perform a diligent inquiry after it sent certified mail to an address of record, a forwarding address and employed a private investigator to locate the individual).

[3] *See Schram v. Dep't of Prof'l Reg.,* 603 So. 2d 1307, 1308 (Fla. 1st DCA 1992), where the agency sanctioned an individual based on a professional sanction in another state. The court held that despite the fact that the licensee was statutorily required to maintain a current address with the agency and notice was sent to the address on file, the agency should have also attempted to serve the licensee at the out-of-state address on the original notice of sanction.

[4] §120.60(5), Fla. Stat. (2010).

[5] *Shelley v. Dep't of Fin. Servs.*, 846 So. 2d 577(Fla. 1st DCA 2003).

[6] *Id.*

[7] *Id.* The majority in *Shelley* found that the licensee received notice by regular mail. A dissenting opinion contended that there should have been an evidentiary hearing to determine whether or not the notice had in fact been received.

[8] *See* HB 713 and SB 1330, passed 5/27/10.

[9] *Shelley*, 846 So. 2d at 577; and *Schram*, 603 So. 2d at 1307.

[10] *Shelley*, 846 So. 2d at 578.

[11] §120.60(5), Fla. Stat. (2010).

[12] §455.275(3)(b), Fla. Stat. (2010).

[13] April Skilling, Deputy General Counsel for the Department of Business and Professional Regulation, interviewed by phone on November 4, 2010.

[14] Cost figures for typical process server and legal ad fees provided by Marian Lambeth, Bureau Chief, Professional Practices Services, Department of Education.

***Bonnie Wilmot** is Assistant General Counsel for the Florida Department of Corrections in Tallahassee. The views expressed here are solely those of the author and are not intended to reflect the views of the Department of Corrections or any other state agency.*