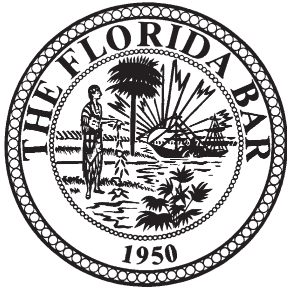

Administrative Law Section Newsletter

Vol. XXIX, No. 4 Donna E. Blanton, Editor June 2008

The Open Government Act: The 2008 Amendments to the APA

by Lawrence E. Sellers, Jr.

Last year, the Florida Legislature approved a number of changes to Florida's Administrative Procedure Act ("APA").[1] Among other things, the 2007 bill would have provided for additional restrictions on the use of unadopted rules, based largely on recommendations by the Joint Administrative Procedures Committee ("JAPC").[2] The Governor vetoed this measure because of concerns regarding unintended consequences, and he directed state agencies to work with the Legislature "to address any concerns, recommend changes to streamline government, simplify procedures, and better serve the people of Florida."[3]

During the 2008 Regular Session, the Legislature revised the 2007 bill to address the Governor's concerns and enacted SB 704.[4] Here's a brief summary of some of the key provisions in "The Open Government Act," including those changes to the 2007 bill that were designed to address issues raised by the Governor's office. The Governor signed the 2008 legislation in early June.

Rulemaking

Defines and Clarifies Rulemaking Authority. Section 2 of the Act adds new definitions to section 120.52, including a definition of "rulemaking authority." The term is defined to mean "statutory language that *explicitly* authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term "rule." The stated purpose of defining the term is to clarify that agencies have the duty or authority

See "Open Government Act," page 11

From the Chair

by Andy Bertron

The Administrative Law Section was founded in 1977-78, which means we are celebrating our 30th anniversary as a section. That's thirty years of administrative lawyers volunteering their time and skills to put on quality CLE programs, research and write about APA issues, and make ours the best section in The Florida Bar.

The past year was no exception. It got started early when Donna Blanton took the helm as editor of the newsletter, a demanding job that Elizabeth McArthur did so well for so many years. We all juggle constant deadlines in our day jobs, but Donna volunteered her time to take on a whole new set of deadlines to get the newsletter out on time every quarter. (Of course, it will get easier for Donna after June, when I am gone and she no longer has the time consuming job of editing my columns.) One of Donna's jobs as newsletter editor is to recruit writers, and she landed some good ones this year. Amy Schrader (who also edits the agency snapshots), Bob Harris, Gary Early,

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CHAIR'S MESSAGE
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Michael Dutko, James V. Antista, Kathryn L. Kasprzak, Jon M. Pellett, Toni Egan, and Larry Sellers all wrote newsletter articles during the past year. And the section owes a special thanks to Mary Smallwood, who churns out the appellate case notes year after year (and usually takes on the added job of presenting the case law update at the Pat Dore Administrative Law Conference).

As I write this column, we are in the last week of the 2008 session of the Florida Legislature. For weeks, Administrative Law Judge Linda Rigot has been reviewing bills and amendments and keeping us posted on legislation impacting the APA (in this last week, her email updates are coming hourly). Bill Williams and Wellington Meffert round out the Legislative Committee and advocate the section's legislative positions. Without their collective efforts over the years, the APA would surely be substantially weakened by well-intended but nevertheless ill-advised amendments.

We also have Judge Rigot to thank for her tireless work chairing the council's ad hoc committee on appellate rules revisions. Judge Rigot and her team are nearing completion of proposed amendments to the Florida Rules of Appellate Procedure concerning appeals from administrative proceedings, stays of agency action, and citations.

Scott Boyd chaired the section's CLE Committee this year and in his first term, oversaw one of the section's most challenging, but rewarding, CLEs – Practice Before DOAH. In this joint effort with the Environmental and Land Use Law Section, program chair Wellington Meffert put on a great program that combined lectures and a live mock hearing. This is truly a great program, and I encourage anyone who has not registered in the past to sign up the next time it is offered. Cindy Miller and Michael Cooke produced the Practice Before the Public Service Commission CLE, which was once again a great and well-attended program.

Daniel Nordby handled the thankless job of maintaining the section's website. We usually call Dan only when something is wrong, but now, thank you Dan.

Larry Sellers sets a new standard for Board of Governors' liaison. Yes, Larry keeps us updated on what's going on in the Bar, but he is also an active participant in the section, and he is always eager to contribute.

Dave Watkins, Kent Wetherell and Wellington Meffert comprise our section's Nominating Committee. Together they identify and evaluate candidates for council and officer positions in the section. From experience, I can tell you it is a difficult and time-consuming job, and they do it well.

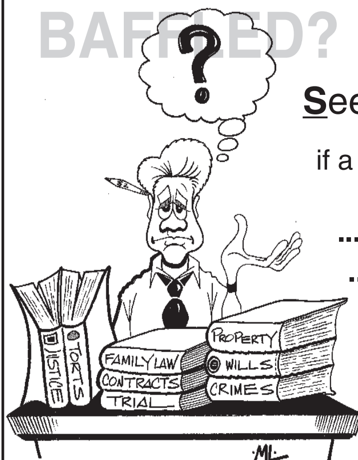
All of your Executive Council members and officers have committee assignments and take on tasks too lengthy to list here. I am most appreciative, however, that they show up at council meetings well prepared and contribute their time and expertise to help the section work through APA issues.

Of course, we all know who really runs the section and does the work. She would be our Program Administrator, Jackie Werndli. In past Chair's farewell columns, Jackie has been described as "dedicated," "the best," "fabulous," and, my favorite, "administrator extraordinaire." All are apt. She truly does keep the section running, and we could not function without her.

Finally, the section will get an upgrade in the Chair position in 2008-09, when Elizabeth McArthur takes over. Elizabeth assumes the Chair after lengthy service to the section and brings a wealth of experience to the job. She will be ready to roll on day one.

It has always been a privilege to be a part of the best section in The Florida Bar.

BAFFLED? BOTHERED? **BEWILDERED?**



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APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Reich v. Department of Health, 33 Fla. L. Weekly 288 (Fla. 4th DCA 2008) (Opinion filed January 23, 2008)

Dr. Reich, an ophthalmologist, was disciplined for part-time work he performed in a metabolic treatment center unrelated to his practice as an ophthalmologist. The administrative complaint alleged multiple violations involving several patients, including unnecessary diagnostic testing, failure to keep adequate records and related charges. The administrative law judge entered a recommended order finding, *inter alia*, that Dr. Reich had kept limited handwritten notes on the patients he was treating. While Reich testified that he had input more elaborate notes in the center's computer system, the judge found that the existence of such notes could not be inferred. He instead accepted the Department's position that the handwritten notes were the only notes prepared by Dr. Reich, even though there had been litigation between the center and Reich over access to the computer records after the center suddenly and unexpectedly went out of business. The judge found that Reich was familiar with the center's computer system and could easily have made copies of the computer files of his patient's records. The Department adopted the findings of fact in the recommended order.

On appeal, the court reversed. Noting that the burden of proof was on the Department to establish by clear and convincing evidence that a violation occurred, it held that the finding of fact that Reich had fabricated the existence of more extensive computer records at the center was not supported by competent substantial evidence. The court apparently reached that conclusion based on the evidence in the record of the center's closing and Reich's and the Department's subsequent unsuccessful efforts to obtain computer records. Holding that the insufficient medical records were not adequate to support a conclusion that violations had occurred, the court reversed the final order.

Costin v. Florida A & M University Board of Trustees, 33 Fla. L. Weekly 336 (Fla. 5th DCA 2008) (Opinion filed January 25, 2008)

Costin was employed by Florida A & M University College of Law in Orlando as a coordinator of computer applications. She reported directly to the law school administration but worked with the University's chief information officer in Tallahassee. The University's policy was that no acquisition or installation of revisions to a computer system occur except in conjunction with the University's "Information Resource Manager."

Following disruption of internet service at the law school following a hurricane in 2004, Costin replaced a firewall in the law school's system without consulting with the Tallahassee office. The replacement was approved by the Dean of the College of Law, however. In addition, Costin created a .com website (FAMUlaw.com) after it was determined that information from the main campus was not being posted in a timely manner to the .edu website for the law school. Based on these two occurrences, Costin was terminated by the University.

The administrative law judge recommended reinstatement of Costin based on the judge's interpretation of the University's rules on disciplinary action and the facts presented at the hearing. The rules provided for a range of penalties for "misconduct" up to and including dismissal. However, under the rules, dismissal was only appropriate where the employee misconduct adversely affects the functioning of the University or jeopardizes the well-being and safety of the employee or other employees or students. The judge determined that Costin's failure to obtain approval from the chief information officer constituted misconduct but that it did not affect the functioning of the University or endanger anyone. The University rejected the judge's finding with respect to the lack of any adverse effect, characterizing it as a conclusion of law.

On appeal, the court reversed and remanded. The court rejected the recharacterization of the finding of fact, holding that the determination of adverse impact was one of ultimate fact to be made by the trier of fact. Alternatively, if the determination was one of law, the court held that an agency does not have authority to simply reject the interpretation of a rule by the administrative law judge. The agency must first show that its substituted interpretation is more reasonable than that of the administrative law judge.

Mae Volen Senior Center, Inc. v. Area Agency on Aging Palm Beach/Treasure Coast, Inc., 33 Fla. L. Weekly 491 (Fla. 4th DCA 2008) (Opinion filed February 13, 2008)

The Mae Volen Senior Center, Inc. ("Center") filed a bid protest challenging the award of a contract to another entity by the area agency on aging ("AAA"), a multi-county area on aging on the central east coast. The administrative law judge dismissed the protest for lack of subject matter jurisdiction, holding that the AAA was not an agency under chapter 120, Florida Statutes.

On appeal, the court reversed. It noted that the Department of Elder Affairs, pursuant to section 20.41, Florida Statutes, was required to contract with the governing body of the AAAs in each of the Department's planning and service areas to provide certain services. Subsection (7) of section 20.41 designated the governing body of the AAA as a "board." The court noted that the AAAs "act as an arm" of the Department, receiving funds from the government and distributing them to service providers.

Further, the court noted that the Department's rules required, *inter alia*, that the AAAs establish a pro-

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cess for "appeal" of decisions awarding contracts to service providers. It concluded that if the service provider was forced to challenge a contract award in circuit court (since no administrative process was available), that was not an "appeal" as required by the Department's rules.

Goodson v. Department of Business and Professional Regulation, 33 Fla. L. Weekly 530 (Fla. 1st DCA 2008) (Opinion filed February 19, 2008)

Goodson requested an informal hearing to challenge an administrative complaint seeking to revoke his real estate license. During the course of the informal hearing, where he represented himself pro se, he made certain statements potentially raising disputed issues of fact. However, he did not request that the Commission refer the matter to the Division of Administrative Hearings ("DOAH"). A final order of revocation was issued.

On appeal, Goodson argued that the Commission was required as a matter of law to refer the matter to DOAH. The Department argued that Goodson had waived that argument by not raising it below. The court affirmed. It held that a claim of error may not be raised for the first time on appeal, despite the apparently mandatory language of section 455.225(5), Florida Statutes, which states that "the [informal] hearing shall be terminated and a formal hearing pursuant to chapter 120 shall be held" where a disputed issue of fact is raised.

Rosenzweig v. Department of Transportation, 33 Fla. L. Weekly 834 (Fla. 1st DCA 2008) (Opinion filed March 25, 2008)

Rosenzweig and several bicyclist groups challenged a decision of the Department of Transportation not to incorporate bike lanes in a project to resurface and restore State Road A1A in Palm Beach County. The petition for hearing stated that petitioners did not know if there were disputed issues of material fact. Accordingly, the Department appointed an internal hearing officer to hear the matter. During the course of the hearing, both sides presented evidence, including testimony and other evidence regarding the financial feasibility of including bike lanes in the project. While it was apparent that there was a dispute between the parties on this issue, no party requested that the matter be referred to the Division of Administrative Hearings.

The Department issued a recommended order concluding that the petitioners lacked standing to request a hearing and that the Department had essentially unlimited discretion in determining whether to incorporate bike lanes into a project. The agency head adopted that order.

On appeal, the court rejected the Department's conclusion that petitioners lacked standing. It held that they had met the two-pronged test in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). In addition to finding that the petitioners would suffer an injury in fact by not having space devoted to their bicycles, the court held that that injury was the type designed to be protected under section 335.065, Florida Statutes. The court further concluded that section 335.065 did not grant the Department unbridled discretion to determine whether bicycle lanes are appropriate. The court noted that the statute required the Department to consider including bicycle and pedestrian lanes in its projects but provided that they were not required where they would be "contrary to public safety," where the "cost would be excessively disproportionate to the need or probable use," or where there was "an absence of need." However, while overturning the Department's construction of that statute with respect to the extent of its discretion, the court held it was compelled to accept the Department's ultimate determination that incorporating such lanes in this specific project would be too costly compared to need.

Finally, the court rejected the Appellants' argument that the matter should have been referred to the Division of Administrative Hearings. While it recognized that disputed issues of material fact were clearly raised in the proceeding below, the failure of any party to request that the informal hearing be terminated and the matter referred to the Division resulted in the waiver of the right to a formal hearing.

B.J. v. Department of Children and Families, 33 Fla. L. Weekly 900 (Fla. 1st DCA 2008) (Opinion filed March 31, 2008)

B.J. sought an exemption from disqualification from employment in childcare that the Department proposed to deny. Following an administrative hearing, the judge entered a recommended order finding that the petitioner had demonstrated by clear and convincing evidence that he had rehabilitated himself, noting that it had been eight years since he was arrested and that he had worked in childcare for four of those eight years. The Department rejected that finding

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of fact on the grounds that his testimony was self-serving and vague.

The court reversed and remanded with directions to grant the exemption. It held that the Department could not reweigh the testimony and substitute its opinion for that of the administrative law judge.

Alpha Eta Chapter of Pi Kappa Alpha Fraternity v. University of Florida, 33 Fla. L. Weekly 1019 (Fla. 1st DCA 2008) (Opinion filed April 14, 2008)

Pi Kappa Alpha appealed a final decision of the University of Florida suspending it from campus through 2011. The suspension was based on allegations of violations of the University's alcoholic beverages policy. A formal hearing was held before the Greek Judicial Review Board at which several police officers testified about their investigation. Videotaped interviews of other individuals were also submitted into evidence; however, none of the complaining witnesses testified at the hearing. Counsel for the fraternity objected at the hearing that such testimony was hearsay, but all such objections were rejected. The Dean of Students accepted the findings of the Judicial Review Board and, again, rejected the hearsay objections. That decision was appealed to the Assistant Vice President for Student Affairs who upheld the Dean's decision.

On appeal, the court reversed and required that the fraternity be reinstated. It noted that the University's own rules required that parties in formal proceedings be afforded the right to question adverse witnesses. Because all of the evidence admitted on behalf of the University was hearsay, the court found that there was not competent substantial evidence to support the decision.

Licensing

Hether v. Department of Health, 33 Fla. L. Weekly 760 (Fla. 5th DCA 2008) (Opinion filed March 14, 2008)

Hether appealed a final order of the Department of Health increasing penalties in an enforcement case where Hether, a chiropractor, was found to have engaged in sexual misconduct with a patient. The final order included a requirement that Hether complete five hours of continuing education in the areas of boundary issues and ethics. The court reversed, noting that the final order did not include a statement of the specific reasons for increasing the penalty with citations to the record. While the Board had discussed the increase in penalties at its meeting in considering the recommended order and had reviewed the record, its failure to include that in the written order required reversal.

Allstate Floridian Insurance Co. v. Office of Insurance Regulation, 33 Fla. L. Weekly 931 (Fla. 1st DCA 2008) (Opinion filed April 4, 2008)

The Allstate companies appealed an immediate final order ("IFO") of the Office of Insurance Regulation that would have suspended their Certificates of Authority to conduct new business in the state. The order was issued as a result of Allstate's alleged noncompliance with subpoenas issued relating to certain of Allstate's practices.

In response to the subpoenas, Allstate produced some documents but virtually all were labeled as "trade secret," including some that were public record. Most requested documents were not produced. In addition, the corporate witnesses provided by Allstate were not able to address the various issues identified in the subpoenas. Counsel for Allstate complained that too little time had been provided to respond to the subpoenas but acknowledged that Allstate had not requested additional time. It was noted that Allstate had failed to respond to similar requests by other state insurance regulators, notably in Missouri where Allstate was in contempt of court and was being fined $25,000 per day.

The IFO detailed the allegations of misconduct in Allstate's claims practices, including using a computer program that immediately reduced any bodily injury claims by 20%, identified the Insurance Code provisions that were allegedly being violated and listed Allstate's "frivolous" objections to the subpoenas.

On appeal, the court upheld the IFO. It held that the alleged monetary losses to policyholders through arbitrary reductions in claims paid constituted an immediate danger to the public health, safety and welfare. The court also concluded that the IFO was narrowly tailored as it only applied to new business Allstate might undertake in the state. Further, the suspension was temporary in that it applied only until Allstate complied with the subpoenas.

W. Frank Wells Nursing Home v. Agency for Health Care Administration, 33 Fla. L. Weekly 959 (Fla. 1st DCA 2008) (Opinion filed April 7, 2008)

The Agency for Health Care Administration ("AHCA") issued a class III deficiency citation to W. Frank Wells Nursing Home alleging failure to comply with Baker Act discharge requirements. Approximately five months later, the nursing home filed a petition for a formal administrative proceeding raising disputed issues of material fact with regard to the alleged deficiencies. The petition did not assert that the petitioner's substantial interests would be affected. AHCA dismissed the petition with prejudice concluding that a notice of deficiency was part of an investigative process and was not final agency action.

On appeal, AHCA argued that the nursing home could not correct any deficiencies in its petition because there was no scenario under which it was entitled to a hearing. The court reversed and remanded. It cited *Menorah Manor, Inc. v. Agency for Health Care Administration*, 908 So. 2d 1100 (Fla. 1st DCA 2005), for the proposition that a notice of deficiency may provide a point of entry. In that case, the notice of deficiency related to food preparation at the nursing home, and the home was required to make the public aware of the alleged deficiencies. The court in this matter remanded to AHCA to allow the nursing home an opportunity to amend its petition to allege how its substantial interests were affected.

M.H. and A.H. v. Department of Children and Family Services, 33 Fla. L. Weekly 881 (Fla. 2d DCA 2008) (Opinion filed March 28, 2008)

The Department of Children and Family Services denied a request from M.H. and A.H. for renewal of their foster care license. The basis for that denial as stated in the Department's notice of denial was that one of the foster children in the applicant's care

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had suffered an injury that could not be considered accidental. Specifically, the child had a small chip fracture in her elbow that the Department's doctors determined could only have occurred as a result of a "significant pulling force." At the hearing, the applicants' doctor, who had treated the child following the injury, testified that the injury was minor and likely occurred as a result of the mother picking up the child from bed by one arm. The Department's two witnesses testified that the injury could only have been caused by excessive force. Following the formal administrative hearing, the administrative law judge entered a recommended order concluding that the Department had failed to demonstrate by a preponderance of the evidence that the injury resulted from a significant pulling force. The ALJ recommended that the foster care license be renewed. The Department adopted the findings of fact and conclusions of law in the recommended order except to the extent that it applied a preponderance of the evidence standard. Instead, the Department concluded that it was only required to provide competent substantial evidence of its allegations. It concluded that its witnesses' testimony met the competent substantial evidence standard and denied the application.

On appeal, the court reversed and remanded with instructions for the Department to issue the license. The court held that the Department had incorrectly construed the law in applying a competent substantial evidence standard and had confused the standard of proof (preponderance of the evidence) with the standard of review (competent substantial evidence). Specifically, the court held that the Department had incorrectly interpreted *Department of Banking and Finance v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996). The court noted that under *Osborne Stern*, the burden of proof in a licensing proceeding shifts during the course of the proceeding. Initially, the applicant must demonstrate its entitlement to the license by preponderance of the evidence; the agency, if it relies on violations by the applicant as the basis for denial, has the burden by the same standard to establish such violations.

Haines v. Department of Children and Families, 33 Fla. L. Weekly 1015 (Fla. 5th DCA 2008) (Opinion filed April 11, 2008)

Haines challenged the action of the Department of Children and Families revoking her foster care license. The Department had alleged that she had abused a foster child in her care by striking the child. Department rules prohibit the use of corporal force by a foster parent. At the hearing, the Department presented the testimony of a nurse practitioner who had examined the child and believed she exhibited linear bruising consistent with being hit with a bungee cord. Pictures were also submitted into evidence. Haines testified on her own behalf. There were purportedly two witnesses to the incident who were interviewed by the police; however, neither of them testified at the hearing.

The administrative law judge, at the hearing, questioned the nurse's testimony in relation to the photographs and stated that he could not see any evidence of bruising in the photos. The judge issued a recommended order recommending that the license be issued. The Department rejected certain of the judge's findings of fact, including the findings related to the photos and the nurse's testimony; it entered a final order revoking the license.

On appeal, the court reversed. It rejected the Department's argument that the correct standard of proof in the administrative proceeding was competent substantial evidence, as opposed to a preponderance of the evidence as applied by the administrative law judge (see *M.H. and A.H. v. Department of Children and Families*, above). The court also found that the Department inappropriately rejected findings of fact, particularly with respect to findings on the reliability of witnesses.

Rulemaking

Department of Highway Safety and Motor Vehicles v. JM Auto, Inc., 33 Fla. L. Weekly 828 (Fla. 1st DCA 2008) (Opinion filed March 25, 2008)

The Department of Highway Safety and Motor Vehicles appealed a final order of the administrative law judge finding that a rule adopted by the Department was an invalid exercise of delegated legislative authority. The Department cited section 320.011, Florida Statutes, as the specific authority for adoption of rules regulating unauthorized additional vehicle dealerships and unauthorized supplemental dealership locations. The statutory provision provided in full that the Department "shall administer and enforce the provisions of this chapter and has authority to adopt rules pursuant to ss.120.536(1) and 120.54 to implement them."

On appeal, the court agreed with the administrative law judge that the general grant of rulemaking authority in section 320.011 was insufficient to meet the requirements of sections 120.52(8)(b) and 120.536(1), Florida Statutes, in that it did not constitute a grant of specific authority.

Appeals

Gopman v. Department of Education, 33 Fla. L. Weekly 596 (Fla. 1st DCA 2008) (Opinion filed February 25, 2008)

Gopman appealed two orders of the administrative law judge; the first expelled Gopman's attorney from the proceeding for multiple instances of unruly and disruptive behavior and the second placed the case in abeyance to allow the petitioner to obtain substitute counsel. During the course of three separate hearings, the attorney repeatedly argued with the judge about rulings in the case, interrupted witnesses and the judge on many occasions, and accused the judge of bias and incompetence. On one occasion, counsel stated that the judge did not understand the issues and he would proceed with his line of inquiry regardless of rulings by the judge. After warning counsel repeatedly that he would be disqualified if his behavior continued, the judge ordered that he be expelled from the proceeding.

On appeal, Gopman argued that the judge lacked authority to expel him in that the judge was attempting to exercise contempt authority. The court rejected that argument, holding that administrative law judges have inherent authority to ensure an orderly hearing. Citing section

120.65(9), Florida Statutes, the court noted that an administrative law judge has authority to impose any reasonable sanction except contempt. Here the court found that the order was issued to maintain order in the proceedings and not to punish the attorney.

Moreover, finding that the appellant's claim was without legal merit when filed, the court imposed attorney's fees on the appellant to split between counsel and the attorney pursuant to section 57.105(1), Florida Statutes. The court noted that it did not have authority under that statute to require the attorney to pay the full amount of attorney's fees, although it suggested that such an award would be appropriate if allowed by the statute.

Suelter v. Department of Management Services, 33 Fla. L. Weekly 772 (Fla. 1st DCA 2008) (Opinion filed March 18, 2008)

Suelter's appeal of an order of the Department dismissing her petition was dismissed by the court as untimely as it was filed more than 30 days after rendition of the final order. Suelter argued that the appeal should be considered timely in that she had filed a "Motion for Reconsideration and to Set Aside Order On Respondent's Motion for Dismissal" with the Department. However, the court held that the time for filing the appeal was not delayed by the filing of such a motion as the agency did not have a rule allowing for such pleadings.

Non-Delegation Doctrine

Sloban v. Florida Board of Pharmacy, 33 Fla. L. Weekly 927 (Fla. 1st DCA 2008) (Opinion filed April 3, 2008)

Sloban, whose pharmacy license had been permanently revoked, filed a petition to initiate rulemaking with the Board of Pharmacy to establish rules allowing for reapplication by pharmacists whose licenses have been revoked. Section 456.072(6), Florida Statutes, provides that revocation of a pharmacy license is permanent but further provides that "the board may establish by rule requirements for reapplication by applicants whose licenses have been permanently revoked. The requirements may include, but are not limited to, satisfying current requirements for an initial license." The Board dismissed the petition, and Sloban appealed.

On appeal, Sloban argued alternatively that the statute was unconstitutional as an unauthorized delegation of legislative authority and that the court could construe the term "may" to mean shall.

The court agreed with Sloban that the statute was unconstitutional under the non-delegation provision of article II, section 3 of the Florida Constitution. While recognizing that "the exceptions [to the doctrine] have largely swallowed the rule," the court found here that the statute gave the agency unbridled authority to determine what standards would apply. The court disagreed with the Board that this was an area that required case-by-case decisions or implicated the technical expertise of the agency in applying the statute. Further, the court held that the unconstitutional language could not be severed from the statute without negating legislative intent. With respect to the use of the term "may," the court held that it could not be construed as mandatory in the context of this statute. Since the statute was unconstitutional, the court upheld the Board's dismissal of Sloban's petition to initiate rulemaking.

Mary F. Smallwood *is a partner with the firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in its Tallahassee office. She is a 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@Ruden.com.*

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New Opinion Issued by Fourth DCA in *Mae Volen Senior Center, Inc. v. Area Agency on Aging Palm Beach/Treasure Coast, Inc.*

by Amy W. Schrader

The Fourth District Court of Appeal has once again determined that an Area Agency on Aging, a non-profit corporation that receives money from the state Department of Elder Affairs ("DOEA") and is directed by Florida Statutes to conduct competitive procurements, is an "agency" subject to the Administrative Procedure Act for purposes of a bid protest proceeding.

The opinion, *Mae Volen Senior Center, Inc. v. Area Agency on Aging Palm Beach / Treasure Coast, Inc.*, 33 Fla. L. Weekly D491 (Fla. 4th DCA February 13, 2008), is the second from the court. The first opinion, issued in August of 2007, reached the same conclusion but with less reasoning, and was withdrawn when the court granted DOEA's motion for rehearing.

The first opinion was discussed in this Newsletter's September 2007 issue in an article entitled *Protest-Proof Procurements?: A Commentary on Mae Volen Senior Center, Inc. v. Area Agency on Aging Palm Beach*. A later issue of the Newsletter (March 2008) reported that the court had vacated its opinion.

To complete the loop, we briefly report here on the court's most recent opinion:

Mae Volen asserted in its appeal that it is entitled to a bid protest hearing at the Division of Administrative Hearings ("DOAH") to challenge an Area Agency's determination to award a contract to a competing vendor because the Area Agency acted on behalf of DOEA and is statutorily and rule-bound to follow Florida's procurement laws. An Administrative Law Judge at DOAH had dismissed Mae Volen's petition, stating that DOAH did not have jurisdiction.

The court's initial opinion reasoned that because the Legislature had used the word "board" in section 20.41(7), Florida Statutes, in referring to an Area Agency, Area Agencies met the definition of "agency" under chapter 120, Florida Statutes. On February 13, 2008, the court issued a new and more expansive opinion again concluding that Area Agencies are "agencies," but this time giving a different explanation for its ruling. The court's rationale for finding that DOAH has jurisdiction to hear Mae Volen's bid protest is:

> Because the legislature designated the area agencies on aging as 'boards' performing the programmatic and funding requirements of the DOEA, as well as the fact that they exercise multi-county authority and perform essentially government functions in authorizing the spending of public funds and contracting with lead agencies, we conclude that DOAH has authority to hear this bid protest.

Although the court recognized that the Area Agencies are non-profit corporations, the court noted that DOEA rules provide that DOEA functions through the Area Agencies and "in all respects they act as an arm of the state agency." The "private" company label is disregarded where the non-profit corporation functions under the control of a public agency, the court reasoned (citing *Florida Governor's Council on Indian Affairs v. Tuveson,* 384 So. 2d 217 (Fla. 1st DCA 1980) and *Florida Department of Insurance v. Florida Association of Insurance Agents,* 813 So. 2d 981, 983 (Fla. 1st DCA 2002)).

The court distinguished the situation where an agency contracts with a private company to provide services, such as in *Vey v. Bradford Union Guidance Clinic, Inc.,* 399 So. 2d 1137 (Fla. 1st DCA 1981). In *Vey*, a private company provided mental health services for a mental health board and was determined not to meet the definition of "agency" under chapter 120. The difference between the service provider in *Vey* and the Area Agencies here is that the Area Agencies perform coordination and administration functions that would otherwise be provided by DOEA and are not simply providing services to the agency.

The court was also convinced Area Agencies meet the definition of an "agency" under the APA because they operate in a multi-county area, thus meeting the "territorial" test for determining whether a particular entity is an agency. *See Orlando-Orange County Expressway Auth. v. Hubbard Constr. Co.*, 682 So. 2d 566, 567-68 (Fla. 5th DCA 1996). Although the court found that the Area Agency qualified as an "agency" under the APA, it strictly limited its ruling by stating that the "agency" designation only served to give DOAH jurisdiction to hear bid protests resulting from procurements utilizing a request for proposals (RFP) for lead agency contracts.

The Fourth District Court of Appeal's most recent opinion again confirms that an unsuccessful bidder in an Area Agency procurement for lead agency services has an administrative remedy at DOAH. The court denied DOEA's motions for rehearing, rehearing en banc, and certification as to the second opinion on May 1, 2008, and the court's mandate was issued on May 23, 2008.

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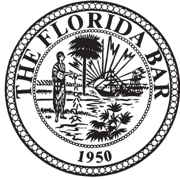

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Agency Snapshot

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The office is headed by Auditor General, David W. Martin, and the General Counsel is John Tenewitz. Mr. Martin was appointed Auditor General in May 2007 by SCR 2874. The office is divided into three divisions each headed by a Deputy Auditor General: the State Government Audits Division (Don Hancock); the Educational Entities and Local Governments Audits Division (Jim Valenzuela); and the Information Technology Audits and Information Technology Support Division (Dorothy Gilbert).

The State Government Audits Division is responsible for the audits of the various state agencies, including the statewide financial and federal awards audits. The Educational Entities and Local Governments Audits Division's responsibilities include audits of the Florida Department of Education, the district school boards, the various public universities and community colleges, and the local governmental units.

Audits are made to determine whether financial resources are properly accounted for; whether compliance with applicable laws, rules, regulations, and policies is met; whether proper and effective internal controls are in place over entity operations; and whether assets are properly safeguarded. Audits are selected not only based on statutory requirements but also based on risk assessments performed on the various agencies.

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The reports prepared by the Auditor General are available on its website: http://www.myflorida.com/audgen/pages/releasedreports.htm.

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Senior Administrative Assistant: Karen Shapiro

The Auditor General is appointed to the office to serve at the pleasure of the Legislature by a majority vote of the members of the Legislative Auditing Committee. The appointment is subject to confirmation by both houses of the Legislature. The Auditor General is required to have been a certified public accountant for 10 years prior to his or her appointment.

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Hours of Operation:

8:00 a.m.-5:00 p.m.
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APA Interaction:

None.

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to adopt rules pursuant to the APA in cases where the statutory language directs or authorizes them to "adopt policies" or "establish criteria" or the like, even though the word "rule" is not used in the authorizing statute.

Clarifies "Specific Powers and Duties Conferred." Section 2 also revises the definition of "invalid exercise of delegated legislative authority" in section 120.52(8) and adds a new definition of "law implemented" to clarify that the "specific powers and duties conferred" refers to the enabling statute.[5] Section 3 of the Act makes a similar change to section 120.536.

Clarifies Authority to Delegate Rulemaking Responsibilities. Section 5 of the Act amends section 120.54(1)(k) to clarify that certain rulemaking responsibilities of an agency head may not be delegated or transferred. These include approval of the notice of intended action and the filing of the approved rule with the Department of State.[6] However, at the request of the Governor's office, this same provision was modified to provide that an agency head may delegate the authority to initiate rule development under section 120.54(2).

Requires Certain Collegial Boards to Conduct Public Hearings. The rulemaking requirements in the APA generally provide that the agency must give affected persons the opportunity to present evidence and argument. In addition, the agency must, if requested by an affected person, schedule a public hearing on the proposed rule. Section 5 of the Act amends section 120.54(3)(c) to require that if the agency head is a board created within the Department of Business and Professional Regulation or the Department of Health, Division of Medical Quality Assurance, the board shall conduct at least one of the public hearings itself and may not delegate this responsibility without the consent of those persons requesting the public hearing.

Requires SERCs to be Made Available. Section 5 of the Act amends section 120.54(3)(e)2 to provide that a proposed rule may not be filed with the Department of State (and therefore may *not* become effective) until the statement of estimated regulatory costs ("SERC") has been provided to all persons who submitted a lower cost regulatory alternative and has been made available to the public.[7]

Clarifies JAPC Authority. Section 7 of the Act amends section 120.545 and makes a number of changes to clarify the duties and powers of JAPC. Among other things, JAPC is now expressly authorized to consider whether a SERC complies with all applicable requirements and to object to a proposed rule if the accompanying SERC does not comply.[8]

Clarifies Cross References to Other Rules of the Same Agency. The APA provides that a rule may incorporate material by reference but only as to material that exists on the date the rule is adopted; for purposes of the rule, changes in the material are *not* effective unless the rule is amended to incorporate the changes. As such, questions have arisen as to whether an agency rule that incorporates by specific reference another rule of that same agency automatically incorporates subsequent amendments to the referenced rule. Section 5 of the Act amends section 120.54(1)(i) and clarifies this by providing that an agency rule that incorporates by specific reference another rule of that agency automatically incorporates subsequent amendments to the referenced rule, unless a contrary intent is clearly indicated in the referencing rule. Any notice of amendment to a rule that has been incorporated by specific reference in other rules of that agency must explain the effect of the amendment on the referencing rules.

Requires Materials Incorporated by Reference to be Available Online. For rules adopted after 2010, section 5 of the Act also amends section 120.54(1)(i) to provide that material may not be incorporated by reference unless the full text of the material can be made available for free public access through an electronic hyperlink from the rule in the *Florida Administrative Code* making the reference; provided, however, if the agency has determined that posting of the material would constitute a violation of federal copyright law, then a statement to that effect, along with the address of locations at the Department of State and the agency at which the material is available for public inspection and examination, must be included in the notice.

Requires Electronic Publication of Code. Effective July 1, 2010, section 9 of the Act requires the Department of State to publish electronically the *Florida Administrative Code* on an internet website managed by the department. The electronic code is to display each rule chapter currently in effect in browse mode and must allow full text search of the code and each rule chapter.

Unadopted Rules

Much of the 2008 Act reflects the Legislature's continuing effort to assert its preference that agencies adopt their policies pursuant to the rulemaking procedures in the APA. This preference is based on the Legislature's view that key goals of the APA are to combat "phantom government" by providing notice of agency policy, encouraging public participation in the development of that policy, and ensuring legislative oversight of delegated authority.[9] Here are some of the provisions in the Act designed to address concerns with unadopted rules:

Defines "Unadopted Rule." Section 2 of the Act amends section 120.52 to add a new definition for the term "unadopted rule." The term is defined to mean "an agency statement that meets the definition of the term 'rule' but has not been adopted pursuant to the [rulemaking] requirements of s. 120.54."

Effect of Filing of Challenge to Agency Statements Defined as Rules. The APA codifies the legislative preference for rulemaking in section 120.54(1), which requires that agency statements meeting the definition of a rule must be adopted as soon as practicable and feasible. The APA also provides a procedure in section 120.56(4) for challenging agency statements defined as rules. If the administrative law judge enters a final order that all or part of an agency statement violates the rulemaking requirement, then the agency is required to immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.[10]

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Agencies typically have responded to such challenges by initiating rulemaking to adopt the challenged statement, because the initiation of such rulemaking generally results in a stay of the challenge to the unadopted statement and the subsequent adoption of the rule moots the challenge. In such cases, the agency may continue to rely upon the challenged statement if the statement meets certain requirements in section 120.57(1)(e). The referenced provision generally requires that the agency demonstrate -- "prove up" -- that the unadopted rule is not an invalid exercise of delegated legislative authority (i.e., it does not enlarge, modify, or contravene the specific provisions of law implemented, etc.) and that the rule is not being applied without due notice.

The 2007 bill would have made significant changes to these provisions. In particular, it provided that upon the *filing* of a petition for administrative determination that an agency statement violates the rulemaking requirement, the agency must *immediately* discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action until either of the following occurs: (1) the proceeding is dismissed; (2) the statement is adopted and becomes effective as a rule; (3) a final order is issued that contains a determination that the petitioner failed to prove the statement constitutes a rule; or (4) a final order is issued that contains a determination that rulemaking is not feasible or not practicable.[11]

This feature of the 2007 bill proved to be the most controversial, and the Governor specifically mentioned it in his veto message, claiming that "such a provision amounts to an injunction against the agency in the absence of any allegation of harm by the challenger and halts enforcement or implementation of laws."[12] As a result, this provision was deleted. However, as noted below, section 12 of the Act amends section120.57(1)(e)1 to provide that effective January 1, 2009, an agency or administrative law judge generally may not base agency action that determines the substantial interest of a party on an unadopted rule.

Agencies May Not Rely on Unadopted Rules. As explained above, the APA currently allows an agency to rely upon a challenged unadopted statement if the agency is proceeding expeditiously and in good faith to adopt rules that address the challenged unadopted statement and the agency "proves up" the unadopted statement in accordance with section 120.57(1)(e). However, section 12 of the Act amends section 120.57(1)(e) to expressly provide that, effective January 1, 2009, an agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule. Notably, this requirement does not preclude application of adopted rules and applicable provisions of law to the facts.[13]

Exception for Recently-Enacted Statutes. In addition to the provision that makes clear that agencies may not rely on unadopted rules, the "prove-up" provisions of section 120.57(1)(e) are deleted — with one exception. At the request of the Governor's office, an exception was created to allow an agency's action to be based upon unadopted rules, subject to review of the administrative law judge, if an agency demonstrates: (1) that the statute being implemented directs it to adopt rules; (2) that the agency has not had time to adopt those rules because the requirement was so recently enacted; and (3) that the agency has initiated rulemaking and is proceeding expeditiously and in good faith to adopt the required rules.

Revises Procedures for Staying Challenges to Unadopted Rules. Section 11 of the Act seeks to simplify the provisions that encourage an agency to initiate rulemaking in response to the filing of a challenge to an unadopted rule. A new provision in section 120.56(4) provides that, upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under section 120.54(3), such notice shall automatically operate as a stay of proceedings pending adoption of the statement as a rule. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings pending rulemaking shall remain in effect so long as the agency is proceeding expeditiously and in good faith to adopt this statement as a rule.

Revises Defenses to Rulemaking Requirement. Because an agency is entitled to a stay of the rule challenge proceedings pending rulemaking, section 6 of the Act amends section 120.54(1)(a) to delete the language that previously provided a "defense" to the rulemaking requirement where the agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules that address the challenged statement.

Clarifies Effect of Determination on Existing Contracts. The APA provides that, if the administrative law judge enters a final order that all or part an agency statement violates a rulemaking requirement in section 120.54(1)(a), then the agency must immediately discontinue all reliance upon this statement or any substantially similar statement as a basis for agency action. In response to concerns from the Governor's office, this provision (section 120.56(4)(d)) is revised to make clear that "this paragraph shall not be construed to impair the obligation of contracts existing at the time the final order is entered."

Attorney's Fees

Increases Limits on Attorney's Fees. Effective January 1, 2009, section 13 of the Act amends section 120.595 to increase from $15,000 to $50,000 the limit on attorney's fees that may be awarded to the prevailing party in challenges to *proposed* and *existing* rules. Section 13 also makes clear that attorney's fees are available in challenges to *emergency* rules.

Revises Attorney's Fees in Challenges to Unadopted Rules. While the APA always has included a limit on the attorney's fees that may be awarded in cases involving challenges to *proposed* or *existing* rules, there is no limit on attorney's fees that may be awarded in cases involving challenges to *unadopted* rules. However, agencies typically avoided the risk of paying attorney's fees in such cases by initiating rulemaking to adopt the

challenged unadopted statement. Effective January 1, 2009, section 13 of the Act makes three notable changes to section 120.595(4), the provision governing attorney's fees in cases involving challenges to *unadopted* rules:

Requires 30-day notice. Section 13 amends section 120.595(4) to provide that attorney's fees and costs may be awarded in challenges to unadopted statements only upon a finding that the agency received notice that the statement may constitute an unadopted rule at least 30 days before the petition was filed and that the agency failed to publish the required notice of rulemaking that addresses this statement within that 30-day period. Notice to the agency may be satisfied by its receipt of a copy of the petition, a notice or other paper containing substantially the same information, or a petition for rulemaking filed pursuant to section 120.54(7). The 30-day notice requirement was added based on discussions with the Governor's office, and it continues to provide a "safe harbor" during which the agency may initiate rulemaking and avoid liability for attorney's fees.

If the agency initiates rulemaking. As noted, the APA currently allows agencies to avoid the risk of paying attorney's fees by initiating rulemaking to adopt the challenged unadopted statement prior to the issuance of a final order. In an effort to encourage agencies to more promptly determine whether to initiate rulemaking — and thus minimize litigation expenses for the challenger and the agency — section 13 amends section 120.595(4) to provide that, if prior to the final hearing (but after the 30-day notice described above) the agency initiates rulemaking and requests a stay of the proceedings pending rulemaking, the administrative law judge shall award reasonable costs and reasonable attorney's fees accrued by the petitioner prior to the date the agency published notice of rulemaking, unless the agency proves that it did not know and should not have known that this statement was an unadopted rule. Given the new 30-day notice requirement, it may be quite difficult for an agency to make such a showing. An award of attorney's fees under this new provision may not exceed $50,000.

Sections 11 and 13 of the Act also make changes that are designed to provide for an award of attorney's fees if the agency initiates rulemaking, but the proposed rule addressing the challenged statement is determined to be invalid. In such cases, the agency must discontinue reliance on the statement and any substantially similar statement until a rule addressing the subject is properly adopted. Section 11 of the Act revises section 120.56(4)(e) to require the ALJ to enter an order to that effect. Section 13 of the Act amends section 120.595(4)(a) to provide that the entry of such an order entitles the challenger to an award of reasonable attorney's fees and costs.

If the agency prevails. Section 13 amends section 120.595(4) to provide that, if the agency prevails in the proceedings, the administrative law judge or appellate court shall award reasonable costs and attorney's fees against the party if: (1) the party participated in the proceedings for an improper purpose; or (2) the party or the party's attorney knew or should have known that a claim was not supported by the material facts necessary to establish the claim or would not be supported by the application of then-existing law to those material facts. This latter ground is similar to that contained in section 57.105, and it was added at the request of the Governor's office in an effort to "close the gap" between the different attorney's fees standards that apply depending upon whether the agency or the challenger is the prevailing party.

Miscellaneous

Clarifies Deadlines for Filing Rule Challenges. Section 10 of the Act amends section 120.56(2)(a) to clarify deadlines for filing challenges to proposed rules when a public hearing has been held or the agency is required to prepare a SERC. The APA provides several "windows" for filing challenges to proposed rules. One of these "windows" is within 10 days after the final public hearing is held on the proposed rule as provided by "s. 120.54(3)(c)." Section 10 revises this reference to "s. 120.54(3)(e)2," which expressly provides that the term "public hearing" includes any public hearing held by any agency in which the rule was considered. A second "window" is within 20 days after the "preparation" of a SERC. Section 10 of the Act also revises this to conform to other provisions of the APA so that the time begins to run only after statement "has been provided to all persons who submitted a lower cost regulatory alternative and made available to the public."

Authorizes Posting of Final Orders on DOAH's Website. Section 3 of the Act amends section 120.53(2)(a) to authorize (but not require) agencies to fulfill their indexing requirements by posting their final orders on DOAH's website.

Restores Language Regarding Disputed Issues of Material Fact and Informal Proceedings. Section 14 of the Act amends section 120.569(1) to make clear that if a disputed issue of material fact arises during a proceeding under section 120.57(2), then, unless waived by all parties, the informal proceeding under section 120.57(2) shall be terminated and a formal proceeding under section 120.57(1) shall be conducted. Similar language previously was included in Uniform Rule 28-106.305, but it was deleted by the Administration Commission in early 2007, reportedly because it was not authorized by statute.

Effective Date. Section 24 provides that the Act takes effect July 1, 2008, except as otherwise expressly provided.[14] Several of the sections have delayed effective dates. For example, the provisions governing challenges to agency statements defined as rules, reliance on unadopted rules, and changes to attorney's fees all become effective January 1, 2009. The provision requiring the publication of an electronic version of the *Florida Administrative Code* becomes effective July 1, 2010.

Endnotes:

[1] *See* HB 7183 (2007) (vetoed June 27, 2007). For a summary of the 2007 bill, see Lawrence E. Sellers, Jr., *The Open Government Act: The 2007 Amendments to the APA*, Vol. XXVIII, No. 4, Administrative Law Section Newsletter 3 (June 2007).

[2] JAPC prepared two reports on unadopted rules. The first report is dated February 2006; a supplement is dated February 2007.

[3] *See* letter dated June 27, 2007, veto of HB 7183, an act relating to administrative procedures. In his veto letter, the Governor expressed

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concern that the bill "substantially rewrites the [Administrative Procedure] Act, potentially creating a number of unintended consequences detrimental to the efficient operation of our State government." The 2007 bill addressed a number of issues, but the Governor's veto letter only mentioned the provision in the bill that would have limited an agency's authority to rely on unadopted statements that are subject to pending legal challenges. The Governor's veto letter is published at Volume XXIX, No. 1, Administrative Law Section Newsletter 3 (September 2007).

[4] SB 704 was sponsored by Senator Mike Bennett (R-Bradenton). The House companion, HB 7127, was a proposed council bill (PCB) by the Government Efficiency & Accountability Council and Representative Ed Homan (R-Tampa).

[5] The phrase "by the same statute," which was replaced by the phrase "by the enabling statute," was an issue in *JM Auto v. DHSMV*, DOAH Case No. 07-0603RX (Final Order, April 20, 2007), affirmed *DHSMV v. JM Auto, Inc.,* 977 So. 2d 733 (Fla. 1st DCA 2008).

[6] This reflects the court's ruling in *Financial Services Commission v. The Florida Insurance Council, Inc.,* 938 So. 2d 545 (Fla. 1st DCA 2006).

[7] Another bill, HB 7109, creates the Small Business Regulatory Relief Act, and amends section 120.54 to require a SERC if the proposed rule will have an impact on small business.

[8] The 2007 bill also would have made clear that JAPC is authorized to review and object to unadopted agency statements. This provision was not included in the 2008 bill, although it should be noted that as a standing committee JAPC has authority to vote an advisory objection to any agency action and that the Legislature is an affected party to any agency exercise of delegated authority.

[9] The Florida Legislature Joint Administrative Procedures Committee, *Report on Unadopted Rules* 1 (February 2006).

[10] For discussion of the limits on agency reliance on non-rule policies, *see* Kent Wetherell, Lawrence E. Sellers, Jr., and Wade L. Hopping, *Rulemaking Reforms and Non-Rule Policies: A Catch-22 for State Agencies,* LXXI Fla. Bar J. 20 (March 1997); Lawrence E. Sellers, Jr. and Cathy M. Sellers, *Non-Rule Policy and the Legislative Preference for Rulemaking*, LXXV Fla. Bar J. 38 (January 2001).

[11] *See* § 9, HB 7183 (2007).

[12] *See* veto letter dated June 27, 2007.

[13] This appears to be consistent with the court's ruling in *The Environmental Trust v. Department of Environmental Protection*, 714 So. 2d 493 (Fla. 1st DCA 1998). For a discussion of this decision, *see* Lawrence E. Sellers, Jr., *The Environmental Trust*: *Will the Exceptions Swallow the "rule?"*, XX ELULS *Reporter,* No. 2 (March 1999).

[14] The Act does not indicate whether it applies to proceedings begun but not yet completed before the effective date. By comparison, the version of the APA originally enacted in 1974 included provisions intended to address the effect of the new Act on pending adjudicatory proceedings.

The general rule is that a statute that relates only to a procedural remedy applies to all pending cases, but there can be no retroactive application of substantive law without a clear directive from the Legislature. For example, Florida courts previously have held that the right to collect attorney's fees may be substantive in nature and therefore may not be applied retroactively. In one of the first appellate decisions interpreting the 1996 APA legislation, the court concluded that certain provisions were "means and methods" by which the administrative determination is rendered, and therefore are procedural in nature. *Life Care Centers of America, Inc., v. Sawgrass Care Center, Inc.*, 683 So. 2d 609, 614 (Fla. 1st DCA 1996).

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New Bar password procedure outlined

Florida Bar members who don't already have a password to access restricted areas of the Bar's Web site will soon have an opportunity to select two methods to obtain one. A form will be mailed along with the annual membership fee statement enabling Bar members to instantly get a password to access members-only sections of the Bar's Internet Web site.

Communications Committee Chair-elect Richard Tanner presented details at the Board of Governors' recent meeting.

Having a password gives Bar members access to a variety of online services through the Bar's Web site, www.floridabar.org. Those include the Fastcase free legal research service, paying annual membership fees, changing their membership records such as their official Bar address, designating an inventory attorney for their practice, inquiring about their CLE credits, posting CLE credits for a course, and registering and paying for CLE courses.

Members who want an instant password must provide the Bar with their e-mail address and the last four digits of their Social Security number, Tanner said, using the form in the annual membership fee statement. Once the Bar has received that information, the member can instantly get a password online through the Bar's Web site by following the instructions.

Having the e-mail address and last four digits of the member's Social Security number enables the Bar to verify the specific member requesting the password, Tanner said.

Members who don't want to use the form will be able to use the current system. That system allows members to request a password online, but it is then mailed to them, a process that usually takes five to seven business days, he said.

In response to a question, Tanner said that under public records laws, members' e-mail addresses becomes public record once the Bar has them. However, the last four digits of their Social Security numbers remain confidential to prevent identity theft.

Members who already have a password for the restricted areas will see no change and can continue to use their current password, Tanner said. However, the new system can be used if they lose or forget their password or need to replace it for security reasons.

Expanded Member Profiles Now Available on Bar's Web Site

Visitors to the Find-a-Lawyer section of The Florida Bar Web site can now find out so much more than just the basics.

Previously listing only limited information about each Bar member, an expanded version of the Find-a-Lawyer section is now ready for lawyers to provide more details about themselves, including Web addresses, areas of practice, schools attended, languages spoken, and even a photograph.

Although Bar members are responsible for adding any information they would like to have appear on their pages, most categories are limited to selections in a drop-down list to maintain professionalism and uniformity in certain areas. Members wishing to add selections can make a request for them directly through the service.

Once a lawyer adds details, the profile page will only display those categories for which information was provided, instead of showing blank spots. The available categories are similar to those provided by Martindale-Hubbell, and the profiles will include a link to Martindale ratings. Lawyers can also include their firms' Web addresses, but these will not link directly to the sites.

Florida Bar members may begin adding information immediately, but both a Bar user name and password are required. Those who need to obtain a password should use the "Request a Password" feature on the Bar's Web site at www.floridabar.org.

The categories of information include:

- Photo (must be attached as an electronic file)
- Law school
- Degrees
- Firm name
- Firm Web site address
- Number of attorneys in your firm
- Martindale-Hubbell rating
- Occupation
- Practice areas
- Services (offered by your firm)
- Languages spoken
- Federal courts (admitted to)
- State courts (admitted to)

To post any or all of this information to your page:

1. From the homepage (www.floridabar.org), click on **Member Profile** just under the red-boxed Member Tools on the right side near the top of the page;
2. Click on **Update address on official Bar record**;
3. Enter your user name (Bar number) and password;
4. Review the information listed on the screen, make any needed changes and then click **Continue**;
5. Click **Yes** on the security alert pop-up;
6. Add any of the information you wish to be displayed on your page; and
7. Click Submit.

The Florida Bar
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