ADMINISTRATIVE LAW SECTION
Newsletter
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Q&A for Practitioners Considering SFGAP Certification

By Judge Gar Chisenhall, Angela Morrison, and Dan Thompson

The Administrative Law Section is encouraging attorneys practicing in this field, and especially Section members, to become Florida Bar certified in State and Federal Government and Administrative Practice (SFGAP). Being "certified" means that an attorney has achieved a high level of competency, understanding, and experience. Certification status also sets the attorney apart, which can be important for potential clients and employers.

Currently, this elite group of SFGAP certified practitioners includes nearly 80 attorneys, yet we have added only two attorneys within the last three years. The Section wants to grow these numbers! That is more of an achievable goal now that the SFGAP Committee recently changed the focus of the examination to reflect the typical practice of our members, and Florida law now makes up 80 percent of the exam while federal law is limited to 20 percent.

To take some of the mystery out of the examination and answer some common questions, we polled three attorneys. Judge Gar Chisenhall has been a big proponent of the SFGAP certification program since the time

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From the Chair

By Judge Brian Newman

And the winners are…

Please join me in congratulating Judge Cathy Sellers, the winner of the Administrative Law Section Outstanding Service Award, and Judge Scott Boyd, the winner of the S. Curtis Kiser Administrative Lawyer of the Year Award.

I'll start with a brief overview of the legal career of Judge Sellers. Judge Sellers has been an administrative law judge since 2011. Before she was a judge, she practiced administrative law in private practice for 23 years. She has been an adjunct professor at the University of Florida Frederic G. Levin College of Law since 1999, where she teaches administrative law.

Judge Sellers became a member of the Executive Council of the Administrative Law Section in 2000, serving as Chair in 2010-2011. She was the program co-chair for the Pat Dore Administrative Law Conference in 2014, 2016, and 2018. Judge Sellers regularly appears at Section events, and is the first to volunteer whenever help is needed.

Judge Sellers is the author of many publications on the subject of administrative law, including: *Florida Administrative Practice Manual*, "Chapter 2, Overview of the Florida

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Administrative Procedure Act," 9th – 11th Eds., (2010-present); "OFFA v. SFWMD: Agencies Need Not Successfully Adopt a Challenged Statement to Avoid a Final Order and Attorney´s Fees," *Florida Administrative Law Section Newsletter* (Mar. 2003); "Intervene Means Intervene: The Florida Legislature Revises Citizen Suit Standing Under Section 403.412(5)," 76 *Florida Bar Journal* 63 (Nov. 2002) (co-authored with Lawrence E. Sellers, Jr.); and "Nonrule Policy and the Legislative Preference for Rulemaking, 75 *Florida Bar Journal* 38 (Jan. 2001) (co-authored with Lawrence E. Sellers, Jr.); and "Vested Rights: Establishing Predictability in a Changing Regulatory System," *Stetson Law Review* (Spring 1991) (co-authored with Robert M. Rhodes).

That is what a career dedicated to the practice of administrative law looks like. It is hard to imagine a more deserving recipient for this award than Judge Sellers.

Judge Boyd—who retired from DOAH in 2019—was a fixture of administrative law in Florida for 35 years. Highlights of Judge Boyd's legal career in administrative law include serving as the Executive Director and General Counsel of the Joint Administrative Procedures Committee and senior judge for the Division of Administrative Hearings, Southern District.

During Judge Boyd's time as Executive Director and General Counsel, JAPC reviewed over 21,000 agency rules. Additionally, Judge Boyd guided JAPC into the information age by overseeing the development of its website FALCON (Florida Administrative Law Central Online Network). FALCON is a wonderful tool for administrative law practitioners because it allows one to track the progress of JAPC's review of a proposed rule. The website also contains links to publications and has an annotated chapter 120 database which includes law review and journal articles, case law, DOAH decisions, and attorney general opinions.

Anyone who has had the pleasure of speaking to Judge Boyd knows that he has a deep interest in the APA. He is a past Chair of The Florida Bar Administrative Law Section, a member of the Administrative Law Section Executive Council, and a past Chair and member of the State and Federal Government Administrative Practice Certification Committee. Judge Boyd has published numerous law review articles on administrative law and has made presentations at organizations such as the National Association of Secretaries of State, the National Association of Administrative Law Judges, and the National Conference of State Legislatures. Additionally, he has presented at and chaired the Pat Dore Administrative Law Conference. He is board certified in State and Federal Government Administrative Practice.

But what you probably do not know is that Judge Boyd is a sailor, a serious sailor. In 1983, he sailed a 31-foot Golden Hind sailboat from Athens to the Caribbean, following the same route Christopher Columbus took to cross the Atlantic Ocean. His trip started in the Greek islands, then to Sicily, the west coast of Italy, Sardinia, Corsica, Monaco, France, Spain, and down to Gibraltar. He reprovisioned in Gibraltar and sailed down to the Canary Islands to make the Atlantic crossing which took 32 days with no land in sight, and no radio communication or GPS navigation. He navigated using a sextant and the stars. The total trip was nine months. Judge Boyd described the Atlantic crossing as uneventful, but he almost lost the mainmast in a storm in the Mediterranean, shearing 8 of the 9 bolts that held the mast in place.

What does this sailing trip have to do with administrative law? Nothing, it's just a great story. You should ask Judge Boyd about it the next time you see him.

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

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Update on Changes to the Uniform Rules of Procedure

An ad hoc committee tasked with reviewing the Uniform Rules of Procedure has submitted recommended changes to the Executive Council of the Administrative Law Section. The recommended changes may be viewed here.

The recommended changes address, among other things: filing by e-mail, new requirements for qualified representatives, contents of the notice of rights, new requirements relating to service of papers, appearances by specifically-named persons, intervention, additional requirements in connection with the duty to confer, a new rule regarding disqualification of the presiding officer, the computation of time, informal proceedings, emergency action and bid protests.

Members of the Committee are: Paul Drake (Reporter), Seann Frazier, Judge Yolonda Green, Judge Elizabeth McArthur, Judge Li Nelson, Shaw Stiller, Judge Dave Watkins and Larry Sellers (Chair).

The Committee's work included some 13 meetings over 15 months. It benefited greatly from numerous public comments. The Committee initially solicited suggestions and then developed several drafts that were distributed for comment, including drafts dated June 18, September 18 and November 4–all of which were posted on the Section web site. Updates on the Committee's work were provided to the Section's Executive Council in June and November. The Second Report of the Uniform Rules of Procedure Committee dated November 1 may be viewed here.

Following this second report, the Committee solicited and evaluated additional comments and issued yet another draft for comment, dated January 31, 2020. The Committee received several new comments and issued its recommended changes, dated April 27, 2020.

If the Executive Council approves the recommended changes, then these will be submitted to the Administration Commission, which has the exclusive authority to propose and adopt changes to the Uniform Rules of Procedure.

The Uniform Rules were last updated in 2013 based on recommendations from the Section. For a summary of these changes, see the April 2013 issue of the ALS newsletter. As in 2013, any amendments to the Uniform Rules will become effective only if formally proposed and adopted by the Administration Commission in accordance with the rulemaking process in the APA.

APPELLATE CASE NOTES

By Tara Price, Melanie Leitman, Gigi Rollini, and Larry Sellers

Application for Level II Trauma Center approval—Impact of statutory amendments and constitutional challenge

Bayfront HMA Med. Ctr. v. Dep't of Health, 290 So. 3d 596 (Fla. 2d DCA 2020)

In December 2017, over the objections of Bayfront HMA Medical Center, an ALJ entered a recommended order (RO) approving Galencare, Inc. d/b/a Northside Hospital (Northside) as a Level II Trauma Center.

Between the entry of the RO and the final order, the legislature amended the operative statutes, and those statutory changes were challenged as unconstitutional by an unrelated third party. Those amendments, if applicable and constitutional, compelled denial of the application because approval would exceed the new statutory maximum of trauma centers for that service area.

The Department of Health adopted the ALJ's RO and entered the approval as a final order, notwithstanding the statutory amendments.

On appeal, the parties did not dispute that the statutory amendments prohibited Northside from operating as a Level II Trauma Center, but disagreed as to the appropriate disposition of the final order. Northside argued that the final order should be vacated as moot but the petition should remain pending until the constitutional challenge was exhausted. Bayfront argued that the statutes mandated not only vacation of the final order, but also entry of another final order denying Northside's application. The question also arose whether the case should be held in abeyance pending implementation or a judicial declaration of the constitutionality of the statutes.

The court found that the new statutory amendments applied for purposes of evaluating Northside's application. The court also explained that the final order was not mooted by the amendments, but was instead rendered erroneous.

The court also concluded that a pending constitutional challenge did not affect the enforceability of those statutes. Because the amended statutes mandated denial of the application, the court concluded it would be inappropriate to vacate the final order and allow the Department to forebear taking the action compelled by the law (denial) merely because a constitutional challenge was pending in circuit court. The court found that such a remedy would be the functional equivalent of a temporary injunction, entered without the requisite findings of fact.

Accordingly, the court reversed the final order and remanded for entry of an order denying Northside's application.

Attorney's Fees—Awards in rule challenges with multiple petitioners

Tampa Bay Downs v. Dep't of Bus. & Prof. Regulation, 293 So. 3d 38 (Fla. 2d DCA 2020)

Multiple challengers of rules proposed by the Department of Business and Professional Regulation (DBPR) governing pari-mutuel wagering appealed a final order determining their entitlement to attorney's fees and costs. The challengers contended that after their proceeding was consolidated with proceedings filed by other parties, the ALJ should not have applied the statutory fee cap to all petitioners in the aggregate.

Section 120.595(2), Florida Statutes, provides that if a proposed rule or any portion thereof is invalidated by a court or ALJ, a judgment or order shall be rendered against the agency for reasonable attorneys' fees and costs, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. The statute also states that no award of attorney's fees shall exceed $50,000.

The ALJ, in considering the fees motions pending in the consolidated cases, concluded that where a group of petitioners acted in a concerted and collective manner to achieve a common result, the total award of fees and against the agency is limited to a single $50,000 fee award. Based on this conclusion, the ALJ awarded a single attorney's fee award of $50,000 to the petitioners in the aggregate, in addition to costs. The award did not specify how the $50,000 award was to be apportioned among the petitioners.

On appeal, the sole issue was whether after separate rule challenge proceedings are consolidated, the limitation on attorney's fees imposed by section 120.595(2) applies on an aggregate basis or per petition.

While all parties contended the plain language supported their view of the statute, the court found the differing views reflected that the plain language, standing alone, did not yield a clear answer to the question. The court therefore considered the statute in light of the scheme set forth in chapter 120, and in light of the references to section 120.56, Florida Statutes. Section 120.56 specifically states that any person who is substantially affected by a rule or proposed rule may seek an administrative determination of its invalidity, and prescribed what must be contained in "the petition."

Thus, a single party is entitled to file a petition challenging a proposed rule. If that petition results in a declaration that the proposed rule or a part thereof is invalid, that petition is

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entitled to recover reasonable attorney's fees of up to $50,000.

The court explained that this entitlement is a substantive right. Thus, it cannot be altered by the consolidation of proceedings on one petition with proceedings on another. Instead, the purpose of consolidating cases is merely to minimize expense and delay—it affects the procedure of the cases, but not the substantive rights of the parties, and does not destroy their separate identities.

The rule governing consolidation in administrative cases likewise permits it only where it would promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party. Under the interpretation that a single capped award applies to all consolidated parties would eliminate the ability to consolidate similar rule challenges, for doing so would always prejudice the rights of the petitioners where the separate petitioners seek a common result.

The court was also unpersuaded by the agency's argument that allowing separate capped awards would incentivize the running up of fees through duplicative petitions because section 120.595(2) mandates a "reasonable" fee award that may contemplate duplication and economies of scale, and the factors set forth in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), should protect against abuse.

The court therefore concluded that the ALJ acted beyond the ALJ's authority in fashioning an exception to a prevailing petitioner's statutory right to recover up to $50,000 in attorney's fees, when the legislature prescribed no such exception. The court held that the fees prescribed in section 120.595(2) cannot be applied on an aggregate basis but rather must be applied to each petition. The court reversed the ALJ's order and remanded for further proceedings.

Judge Black specially concurred, noting that the plain language, with effect given to the related statutory provisions, supported the result, without resort to principles of statutory construction.

Declaratory Statement—Sufficiency of request and agency deference standard applicability
La Galere Mkts., Inc. v. Dep't of Bus. & Prof. Regulation, 289 So. 3d 553 (Fla. 1st DCA 2020)

La Galere Markets (LGM), a company which operates mini-market stores that use self-checkout technology, sought a declaratory statement from the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (DBPR) regarding its plan to sell alcoholic beverages through automated dispensing machines (ADMs). In its statement, rendered in a final order, DBPR took the position that the alcohol-dispensing ADMs violated Florida's Beverage Law.

In DBPR's response to LGM's request, it declined to address certain aspects of the declaratory statement request due to lack of details about such things as the proposed locations of the ADMs. The court affirmed that portion of the order on appeal.

DBPR went on to conclude that the lack of express statutory authority for ADR alcohol sales was indicative of a legislative intent to prohibit this type of transaction. In support of this finding, DBPR cited ten provisions in the Beverage Law that it contended barred LGM's sale of alcohol in ADRs.

Noting that agency deference was eliminated with the passage of article V, Section 21 of the Florida Constitution, the court found it unnecessary to determine the impact of the new standard because the final order was rendered prior to the passage of the constitutional amendment. The court also noted that when an agency's view conflicts with the plain meaning of the statute, a de novo standard is appropriate notwithstanding the previous standard requiring agency deference.

The court, in its review of the final order, evaluated all ten provisions of the Beverage Law raised by DBPR and found all unavailing, noting that nothing in the plain language of the

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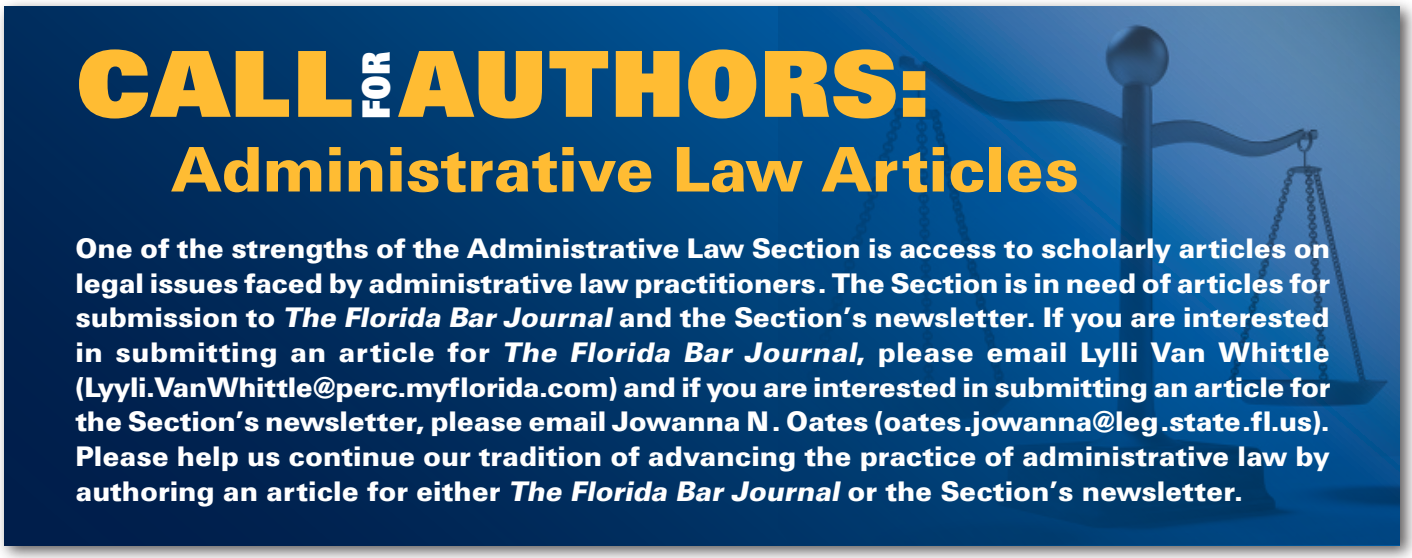

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cited statutes prohibited this type of sale. As such, the court reversed that portion of the final order and remanded for further proceedings.

In a final footnote, the court clarified that its reversal of the challenged order was based solely on its review of the provisions of the Beverage Law raised by DBPR, and should not be interpreted as holding that the Beverage Law permits this type of sale or that there are no other portions of the Beverage Law that would prohibit it.

Due Process—Litigation of re-application & dismissal without a hearing
Pumphrey v. Dep't of Children & Families, 292 So. 3d 1264 (Fla. 1st DCA 2020)

The Department of Children and Families (DCF) denied James Pumphrey, Sr.'s application for certain Medicaid benefits, and he requested a hearing. Before DCF conducted the hearing, agency counsel filed a motion to dismiss. DCF argued that the issues raised in the application and petition for hearing had been litigated in a prior application. The hearing officer dismissed the case without holding a hearing.

On appeal, the court found that the issues Mr. Pumphrey sought to litigate had been litigated in a prior application—specifically, the issues of his eligibility for certain Medicaid benefits and DCF's inability to conduct required income verification. The parties and the issues in both applications were identical and Mr. Pumphrey was afforded an opportunity to fully and fairly litigate the issues under the prior application. Consequently, the doctrines of res judicata and collateral estoppel barred Mr. Pumphrey from seeking review of his re-application on those issues. Administrative finality also operated to bar review of the re-application, as there had been no significant change in circumstances from the previous application.

The court additionally concluded that Mr. Pumphrey had not been denied due process. The court found that he was given both notice and an opportunity to be heard, but failed to timely file a response to DCF's motion to dismiss, thereby waiving his opportunity to be heard on that motion. Dismissal was therefore appropriate.

Evidence—Unrebutted testimony regarding Medicaid lien allocation
Bryan v. Agency for Health Care Admin., 291 So. 3d 1033 (Fla. 1st DCA 2020)

Emily Bryan sought review of a final order compelling her to fully pay off a Medicaid lien imposed by the Agency for Health Care Administration (AHCA) on her settlement of a medical malpractice lawsuit.

At an administrative hearing, the parties adduced evidence to determine what amount of Ms. Bryan's settlement agreement should be repaid to Medicaid. As a condition of Ms. Bryan's eligibility for Medicaid, Ms. Bryan assigned to AHCA her right to recover medical expenses paid by Medicaid from liable third parties. Ms. Bryan offered the testimony of two trial attorneys admitted as experts on the valuation of damages who testified the lien should be reduced from the full amount to 10% of the amount paid by Medicaid on the basis that the settlement reflected only 10% of her total damages, including the claim for past medical expenses, based on a pro rata methodology. Ms. Bryan also submitted an affidavit of a former judge who affirmed that Ms. Bryan's method of calculating the proposed allocation was reasonable and results in an accurate estimation of the portion of the settlement that should be allocated to past medical expenses.

AHCA did not call any witnesses, present any evidence as to the value of Ms. Bryan's damages, propose a differing valuation of the damages, or present evidence contesting the methodology used to calculate Ms. Bryan's allocation to past medical expenses.

In the final order, the ALJ recast Ms. Bryan's pro rata allocation formula as a "one size fits all" approach, and rejected her evidence. The ALJ concluded that to rebut the formula, Ms. Bryan had to prove that it was more probable than not that it was the parties' intent that only 10% of the amount paid by Medicaid be allocated for past medical expenses, and that she had not met that burden of proof. The ALJ therefore ordered Ms. Bryan to pay the full amount of the Medicaid prior payment.

Based on the Florida Supreme Court's decision in *Giraldo v. Agency for Health Care Administration*, 248 So. 3d 53 (Fla. 2018), the court held that because federal law restricts Florida's assignment rights and lien to settlement funds fairly allocable to past medical expenses, there must be a reasonable basis in the evidence before the ALJ may reject a pro rata methodology. Because there was none in Ms. Bryan's case, the court reversed and remanded for further proceedings.

Legislative Subpoenas—Records sought regarding agency contracts
Metz v MAT Media, LLC, 290 So. 3d 622 (Fla. 1st DCA 2020)

The Public Integrity and Ethics Committee of the Florida House of Representatives issued subpoenas to MAT Media, LLC and Charles "Pat" Roberts, seeking all records concerning MAT Media's production and airing of Emeril's Florida for the preceding five years. These subpoenas were issued in conjunction with the House's consideration of a bill to enhance accountability and reduce fraud, waste, and abuse in state government contracts.

In response to the subpoenas, MAT Media and Mr. Roberts sought injunctive and declaratory relief "to determine their duty to respond to the subpoenas," specifically asserting that the subpoenas "exceeded the scope of a legitimate legislative investigation, sought disclosure of trade secret information, and invaded Mr. Roberts' right to privacy."

After an evidentiary hearing and in camera review of the requested

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records, the trial court quashed portions of the subpoenas and found that the requested items would not shed light on the particular issues the House was investigating, were not germane to the investigation, and that Mr. Roberts' privacy interests weighed in favor of denying production.

On appeal, the court reversed the order quashing the subpoenas and remanded for further proceedings, finding the legislature's broad power to investigate paired with the separation of powers doctrine constrains courts from quashing subpoenas, except when "plainly incompetent or irrelevant to any lawful purpose of the legislature." The court concluded that because the documents sought by the subpoenas were not unrelated to the House's area of inquiry, they should have been enforced, leaving the House, not the courts, to decide the value of the information.

Additionally, the court found that although Mr. Roberts does have a constitutional right to privacy, MAT Media, as a corporation, does not; because the only records sought were the financial records of MAT Media and not those of Mr. Roberts individually. As such, the trial court erred in quashing the subpoenas based on a constitutional right to privacy.

Licensure—Revocation of educator's certificate upon entry of guilty plea or conviction
Cabezas v. Corcoran, 293 So. 3d 602 (Fla. 1st DCA Apr. 7, 2020).

Following entry of his guilty plea, Andres Cabezas was convicted in federal court of receiving child pornography and sentenced to 12 years in prison. The Education Practices Commission (Commission) filed an administrative complaint seeking to revoke Mr. Cabezas educator's certificate because he pleaded guilty to and was convicted of a disqualifying criminal offense under chapter 1012, Florida Statutes. Mr. Cabezas requested a formal hearing and argued that the Commission could not revoke his certificate because he was appealing his federal conviction.

The Commission determined that Mr. Cabezas' argument did not involve a disputed issue of material fact and thus he was not entitled to a formal hearing under section 120.57(1), Florida Statutes. The Commission instead held an informal hearing under section 120.57(2), and concluded that Mr. Cabezas' certificate should be permanently revoked. Mr. Cabezas appealed, arguing that the Commission (1) deprived him of due process by denying his request for a formal hearing and (2) lacked the authority to revoke his certificate during the pendency of his criminal appeal.

As an initial matter, the court found that Mr. Cabezas was not denied due process because he had no right to a formal hearing. Because Mr. Cabezas' challenge to the Commission's complaint did not involve disputed issues of material fact, the Commission was not required to grant Mr. Cabezas a formal hearing.

The court also held that section 1012.795, Florida Statutes, gave the Commission the authority to revoke Mr. Cabezas' certificate during the pendency of his criminal appeal. The plain language of the statute authorizes the Commission to revoke a certificate upon entry of a guilty plea or conviction of certain disqualifying offenses, including Mr. Cabezas' offense. The court also noted that Mr. Cabezas could not challenge any of the facts supporting his federal conviction in the administrative proceeding.

Thus, the court affirmed the Commission's revocation of Mr. Cabezas' certificate.

Public records—Order issued without hearing is premature
McDonough v. City of Homestead, 45 Fla. L. Weekly D703 (Fla. 3d DCA Mar. 25, 2020)

McDonough appealed from the trial court's final judgment denying mandamus in his action to obtain public records from the City of Homestead. Among other things, he argued that the final judgment was premature because it was entered without a hearing.

The court noted that the City conceded that the final judgment was entered prematurely and that Florida law provides that "whenever an action is filed to enforce the provisions of [Chapter 119], the court shall set an immediate hearing." The court agreed that the plain language of the statute requires a trial court to conduct a hearing on actions seeking to enforce the right to access public records under chapter 119, Florida Statutes, and that, absent a waiver, a final judgment issued without the statutorily-required hearing is premature. Accordingly, the court reversed and remanded for further proceedings.

Rule Challenge—Timeliness of Challenge
Dep't of Elder Affairs v. Fla. Sr. Living Ass'n, 45 Fla. L. Weekly D1290b (Fla. 1st DCA May 29, 2020)

The Department of Elder Affairs (DOEA) appealed a final order that denied its motion to dismiss proposed rule challenge petitions from Florida Senior Living Association, Inc. (FSLA) and the Florida Assisted Living Association, Inc. (FALA), invalidated portions of DOEA's proposed and subsequently enacted rules, and denied DOEA's fees motion.

Initially, DOEA published 11 proposed rule amendments on March 5, 2018, that involved regulation of assisted living facilities. On March 26, 2018, DOEA held a public hearing. Following that public hearing, on April 13, 2018, DOEA published a notice of change that deleted one of the originally proposed requirements in one of the 11 proposed rules. FSLA and FALA filed petitions challenging the originally proposed rules, not the notice of change, on May 2 and 3, 2018.

On May 10, 2018, all of the proposed rules except for the one subject to the notice of change were filed with the Department of State and went into effect. On the same day, FSLA filed a second petition challenging all of DOEA's newly adopted rules.

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DOEA moved to dismiss the first rule challenge petitions, arguing that both were untimely filed. The ALJ concluded that the notice of change restarted the statutory deadline for proposed rule challenges to be filed. The ALJ also allowed FSLA and FALA to maintain their challenge to all 11 proposed rules, even though only one proposed rule was the subject of DOEA's April 13 notice of change/withdrawal. After a hearing, a final order was entered invalidating seven of the eleven proposed rules and denying DOEA's fee motion on the basis that it had not prevailed.

On appeal, the court found that the petitions were untimely on the basis that they were filed more than 21 days after DOEA issued its March 5 notice of publication of the proposed rules; that no other window of time enumerated in section 120.56(2)(a), Florida Statutes, applied; and that no challenge was made to the contents of the notice of change. The court distinguished *Florida Pulp & Paper Association Environmental Affairs, Inc. v. Department of Environmental Protection*, 223 So. 3d 417 (Fla. 1st DCA 2017), on the basis that *Florida Pulp* addressed the timing of a challenge only from the statement of estimated regulatory costs (SERC) point of entry, concluding that a revised SERC would restart the clock from which a challenge could be taken from the point that the revised SERC was "prepared and made available."

FSLA and FALA's challenges, on the other hand, involved the fourth section 120.56(2)(a) point of entry, which provides a challenger 21 days from publication of a notice of change to file a challenge. That point of entry includes a caveat in the statute, which states that "[a] person who is not substantially affected by the proposed rule as initially noticed, but who is substantially affected by the rule as a result of a change, may challenge any provision of the resulting proposed rule." The court concluded that this provision reasonably limits proposed rule challenges under the fourth point of entry to individuals affected by any additional change to a proposed rule. Because the notice of change from which challenge was taken simply restored the status quo and did not substantially change or affect the proposed rule, it did not create a new window for FSLA and FALA to file their challenges to the originally proposed rules.

The court also rejected the argument that the challenges were timely because even though the notice of change/withdrawal involved only one of the 11 rules, DOEA jointly noticed all of the rules as a set initially. The court found they were separate and distinct rules. As a result, the timeliness of FSLA and FALA's challenges had to be considered within the four corners of the notice of change, which involved only a rule that wasn't challenged.

The court, however, noted that FSLA's May 10 petition that challenged the rules after they took effect was timely. The court proceeded to analyze those rules one by one, finding they were reasonable, valid, and within DOEA's authority. The court also rejected the argument that only AHCA was authorized to formulate certain forms, instead of DOEA. The court pointed to statutes which indicate that DOEA is responsible for adopting "rules, policies, and procedures to administer" the pertinent part of chapter 429, Florida Statutes, in consultation with other agencies.

Finally, the court concluded that the ALJ erred in determining that DOEA was not entitled to a fee award on the basis that DOEA was not the prevailing party. While making no finding that any party participated in the proceedings for an improper purpose, the court noted that the final order found that DOEA did prevail as to the validity of four of the eleven proposed rules; thus, DOEA was partially successful in its defense of FALA and FSLA's rule challenges, and was therefore entitled to be considered for partial fees and costs, citing *Board of Regents v. Winters*, 918 So. 2d 313, 314 (Fla. 2d DCA 2005) (ordering a reduction in the amount of attorney's fee awarded to appellee pursuant to lodestar approach due to appellee's partial success).

On the issue of fees, FALA sought clarification, asking whether upon remand the ALJ should determine entitlement to fees under the statutory improper purpose standard, in light of the lack of any finding on improper purpose made in the opinion or order on appeal.

FSLA sought rehearing, rehearing *en banc*, and to certify questions of great public importance to the Florida Supreme Court. FSLA raised not only whether the statutory standard for an award of fees had been decided or met, but also several issues in which precedent and statute appeared to dictate a different result, including the opinion's expansion of DOEA's statutory rulemaking contrary to established precedent strictly limiting agency rulemaking authority. FSLA's motion also questioned whether deference was appropriately given to DOEA's interpretation of its own rule (provided through testimony at hearing) rather than the meaning of the plain text in light of the recent elimination of agency deference under the Florida Constitution. FSLA asked that these issues of interpretation and extent of rulemaking authority be certified as questions of great importance for the Florida Supreme Court to determine.

The court granted the parties' motions in part, and withdrew its initial opinion. In its substituted opinion, the court added the standard under section 120.595 for an award of fees to an agency, and the finding that FALA's challenge to DOEA's SERC was plainly frivolous. As a result, the court concluded that DOEA is entitled to reasonable attorney's fees from FALA in relation to the SERC allegation only.

Standing—Ability of economic competitor to appeal administrative licensing order
Louis Del Favero Orchids, Inc. v. Dep't of Health, 290 So. 3d 165 (Fla. 1st DCA 2020)

Eight applicants who sought licensure as medical marijuana treatment centers under section 381.986(8), Florida Statutes, filed administrative actions against the Department of

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Health (DOH). Administrative proceedings began at DOAH, and Louis Del Favero Orchids, Inc. (Del Favero) moved to intervene as a competitor in six of the eight proceedings. The DOAH proceedings were remanded back to DOH after the circuit court in *Florigrown, LLC v. Florida Department of Health*, Case No. 2017 CA 002549 (Fla. 2d Cir Ct., Leon Cty.), issued an injunction. DOH and the eight applicants then entered into a joint settlement agreement providing for the licensing of all eight applicants and dismissal of the eight administrative actions. DOH entered final administrative orders based upon the joint settlement agreement. Del Favero appealed the eight final administrative orders, raising a number of issues.

The court declined to address the merits of the case because Del Favero lacked standing to bring the appeal. The court found that Del Favero was not a specifically named entity whose interests were being determined in the eight administrative proceedings at DOAH or the actions at DOH. Del Favero did not make an appearance as a party in the administrative actions and the proceedings were closed before Del Favero received a ruling on any of its six motions to intervene. Furthermore, Del Favero was not a party to the joint settlement agreement, and DOH had not denied any application by Del Favero for licensing.

The court noted that Del Favero had claimed injury based on its economic interests, but it reasoned that Del Favero could not have shown its substantial interests were affected by the DOAH proceedings. Del Favero could not have shown the injury-in-fact prong of the *Agrico Chemical* standing test because Del Favero never applied to DOH for a license, and three potential licenses remained available following DOH's entry of the eight final orders. Moreover, even if Del Favero had intervened, its rights would be subordinate to the rights of the parties, who had chosen to settle their claims and voluntarily dismiss the actions.

Because Del Favero lacked standing, the appellate court dismissed the appeals.

Standing—Ability of complainant to appeal disciplinary probable cause finding
Stolar v. Dep't of Health, 45 Fla. L. Weekly D311 (Fla. 3d DCA Feb. 12, 2020)

Henry S. Stolar made a disciplinary complaint against a podiatrist, and the Department of Health (DOH) investigated the complaint. DOH presented the administrative case to the Probable Cause Panel (the Panel) for the Board of Podiatric Medicine. The Panel determined there was no probable cause of a violation.

Mr. Stolar appealed the Panel's decision. DOH moved to dismiss the appeal, arguing that Mr. Stolar was not a party to the administrative action and therefore lacks standing to bring an appeal. Mr. Stolar cited *Portfolio Investments Corp. v. Deutsche Bank National Trust*, 81 So. 3d 534 (Fla. 3d DCA 2012), and argued that though he was not a party, he should be afforded standing because he initiated the complaint and was critical to the investigation.

The court observed that standing to seek appellate review of administrative cases is governed by section 120.68(1), Florida Statutes., which permits only parties to appeal final agency action. Section 120.52(13), Florida Statutes, provides four situations in which a person or entity is considered a "party" under the Administrative Procedure Act. The court noted that each of the four situations requires a "party" to have been a participant in the administrative proceeding. Furthermore, *Portfolio Investments* is a foreclosure case involving a company whose property interests were being determined. Thus, the court ruled *Portfolio Investments* distinguishable from Mr. Stolar's appeal, because the Panel did not make any determinations involving his property interests, rights, or privileges.

Because the court held that Mr. Stolar lacked standing to appeal the Panel's determination, it granted DOH's motion to dismiss his appeal.

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DOAH CASE NOTES

By Gar Chisenhall, Matthew Knoll, Dustin Metz, Virginia Ponder, Christina Shideler, Paul Rendleman, and Tiffany Roddenberry

Substantial Interest Proceedings

Agency for Pers. with Disabilities v. Rivero Grp. Home, Case No. 19-6010 FL (Recommended Order April 17, 2020), https://www.doah.state.fl.us/ROS/2019/19006010.pdf

FACTS: The Agency for Persons with Disabilities ("APD") licenses foster care facilities, group homes, residential habitation centers, and comprehensive transitional education programs. Yitzhad Rivero owns the Rivero Group Home, a facility in Dania Beach, Florida, that applied for licensure renewal in June 2019. Unbeknownst to Mr. Rivero, an administrator at Rivero Group Home submitted the licensure renewal application with a falsified fire inspection report. APD then issued an administrative complaint seeking to revoke the Rivero Group Home's license.

OUTCOME: The ALJ recommended that the administrative complaint be dismissed. In doing so, the ALJ noted case law standing for the proposition that a licensure revocation cannot be based solely on the wrongdoing or negligence of the licensee's employee. Instead, the licensing body must prove that the licensee was responsible in that he or she knew, or should have known, of the employee's misconduct. The ALJ concluded that the administrator's one-time submission of a falsified fire inspection report did not rise to that level.

Cristal Palace Resort PB, LLC v. Agency for Health Care Admin., Case Nos. 19-1667 & 19-2327 (Recommended Order March 17, 2020), https://www.doah.state.fl.us/ROS/2019/19001667.pdf

FACTS: The Agency for Health Care Administration ("AHCA") is the state entity responsible for regulating and licensing assisted living facilities ("ALFs"). In order to fulfill its duties, AHCA surveyors conduct biennial inspections of ALFs. When Cristal Palace Resort PB, LLC ("Cristal Palace"), an ALF in Palm Bay, Florida, applied to renew its license, AHCA issued a notice of intent to deny the renewal application and followed with a 27-count administrative complaint, based on purported violations noted in four surveys conducted by AHCA at Cristal Palace in 2017 and 2018.

At DOAH, AHCA disputed the applicable burden of proof. Even though AHCA would have to prove its allegations by clear and convincing evidence in a licensure discipline case, AHCA argued that it only had to prove the violations at issue by a preponderance of the evidence because the violations were being used as grounds for denying re-licensure.

OUTCOME: Consistent with the recommendations of other ALJs, the ALJ in *Cristal Palace* said that AHCA must prove the violations upon which it relies to deny re-licensure by clear and convincing evidence. While AHCA has issued final orders rejecting that proposition, the ALJ concluded that he was not bound by those final orders because questions about the applicable burden of proof are outside AHCA's substantive jurisdiction. § 120.57(1), Fla. Stat. Moreover, the ALJ reasoned, the recently enacted article V, Section 21 of the Florida Constitution established that an agency's legal interpretations, even of statutes within the agency's substantive jurisdiction, are no longer entitled to deference.

Network Eng'g Servs,, Inc. v. Dep't of Transp., Case No. 19-5130 (Recommended Order April 17, 2020), https://www.doah.state.fl.us/ROS/2019/19005130.pdf

FACTS: Network Engineering Services, Inc., d/b/a Bolton Perez and Associates ("BPA") is a multidiscipline engineering firm specializing primarily in transportation-related engineering services such as bridge design and construction management. Florida International University ("FIU") contracted with BPA to provide construction engineering inspection ("CEI") services in support of FIU's project to build a bridge in Sweetwater, Florida. As the CEI provider, BPA was to act as the liaison between FIU and the contractor, handle quality control, and monitor the project.

On four occasions over the course of the project, BPA expressed concerns about cracks in the bridge. However, the project's engineer of record stated each time that the cracks were no cause for concern. The bridge collapsed on March 15, 2018, killing six people and critically injuring 10 others. The Occupational Safety and Health Administration ("OSHA") investigated the collapse and issued a report concluding that BPA failed to take appropriate action in the days leading up to the collapse.

Subsequently, when BPA sought to renew its qualification to provide professional services to a governmental agency pursuant to section 287.055(3), Florida Statutes, the Department of Transportation ("DOT") issued notice that it intended to deny BPA's request based on the OSHA report. BPA responded by requesting a formal administrative hearing, and the case was referred to DOAH.

OUTCOME: The ALJ found that DOT lacked good cause to deny BPA's

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request for qualification, finding that DOT failed to demonstrate that BPA's actions as the CEI provider fell below the standard of care and that BPA "met all of its obligations pursuant to contract and state regulation." The ALJ also found that the OSHA report and a pending report from the National Transportation Safety Board were insufficient good cause for DOT to deny BPA's request for qualification. Because BPA was seeking to renew its qualification, the ALJ analogized the case to those involving denial of licensure renewal and held that DOT had to prove by clear and convincing evidence that it had good cause to deny renewal. While the attorneys representing the parties stipulated at the final hearing that the burden of proof was a preponderance of the evidence, the ALJ noted that a tribunal is not required to accept stipulations pertaining to questions of law.

Attorney's Fees

Lightsey v Fla. Fish & Wildlife Conservation Comm'n, Case No. 19-5210F (Recommended Order March 31, 2020), https://www.doah.state.fl.us/ROS/2019/19005210.pdf

FACTS: The Florida Fish and Wildlife Conservation Commission ("the Commission") denied Lee Lightsey's applications for three types of hunting licenses. Mr. Lightsey responded to the proposed denials by requesting formal administrative hearings. The assigned ALJ granted a joint motion and relinquished jurisdiction over the cases pertaining to two of the licenses back to the Commission. The parties settled the remaining licensing dispute prior to the hearing, and the settlement agreement provided for Mr. Lightsey to receive all of the licenses at issue. Nevertheless, Mr. Lightsey sought fees pursuant to sections 120.569(2)(e) and 120.595, Florida Statutes.

OUTCOME: Section 120.569(2)(e) subjects a party to sanctions for filing a pleading, motion, or other paper in a proceeding for an improper purpose such as harassment or unnecessary delay. Mr. Lightsey argued that the Commission's notice advising him of its intent to deny his applications was the pleading, motion, or other paper that had been filed in a proceeding for an improper purpose. The ALJ rejected this argument, concluding that there is no "proceeding" until a party requests a hearing. To conclude otherwise would mean that any "paper an agency generates in the process of reviewing a license or permit application is a paper filed in a proceeding that may give rise someday to a right to recover attorney's fees and costs." As for section 120.595, that statute subjects a party to sanctions for being a "non-prevailing adverse party" and defines that term as a party that "has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding." The ALJ concluded that the proposed agency action at issue was the denial of Mr. Lightsey's licensure applications. Because the Commission sought to support the denial rather than to modify or change it, the ALJ cited *Johnson v. Dep't of Corrections*, 191 So. 3d 965 (Fla. 1st DCA 2016), and ruled that Mr. Lightsey was not entitled to an award of fees pursuant to section 120.595.

Proposed Rule Challenge

Office of the Pub. Counsel v. Fla. Pub. Serv. Comm'n, Case No 19-6137RP (Final Order Jan. 21, 2020), https://www.doah.state.fl.us/ROS/2019/19006137.pdf

FACTS: The Florida Public Service Commission ("the Commission") is the state agency responsible for regulating public utilities. The Commission proposed to adopt five rules ("the Proposed Rules") pertaining to the strengthening of electric utility infrastructure and storm protection plan cost recovery. The Office of the Public Counsel is statutorily authorized to represent Florida's citizens before the Commission and filed a petition with DOAH alleging that certain subsections of the Proposed Rules were invalid. Investor-owned utilities Florida Power & Light, Gulf Power Company, Duke Energy Florida, and Tampa Electric Company were granted leave to intervene.

OUTCOME: In ruling that the portions of the Proposed Rules at issue were valid, the ALJ addressed an allegation that the Proposed Rules' statement of estimated regulatory costs ("the SERC") failed to consider that small businesses would bear any increase in utility rates. The ALJ determined that any rate increases borne by small businesses would not result from adoption of the Proposed Rules. Instead, any rate increases would result from section 366.96, Florida Statutes, enabling utilities to recover costs under future storm protection plan cost recovery clause proceedings. Thus, the ALJ approved of the statement within the SERC that the Proposed Rules would not have an adverse impact on small business.

Unadopted Rule Challenges

SCF, Inc. v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering, Case No. 19-4245RU (Final Order March 13, 2020), https://www.doah.state.fl.us/ROS/2019/19004245.pdf

FACTS: For a pari-mutual wagering permitholder with a slot machine license, section 551.114(4), Florida Statutes, requires that "[d]esignated slot machine gaming areas may be located within the current live gaming facility or in an existing building that must be contiguous and connected to the live gaming facility."

Calder Race Course, Inc. ("Calder") holds a slot machine license and a permit to conduct thoroughbred horse races. In 2016, Calder demolished its grandstand building, and its live gaming facility now consists of an open-air viewing area where patrons watch and wager on live races. Calder's casino is at least 100 yards away from the viewing area, and patrons can travel between the two areas via a partially covered walkway.

Southern Cross Farm ("SCF"), a thoroughbred horse breeder with

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horses operating at Calder, filed a rule challenge alleging that the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division"), relied on an unadopted rule to renew Calder's slot machine license because: (a) Calder no longer has a "live gaming facility" within the meaning of section 551.114(4); and (b) Calder's slot machine gaming area is located in a casino that is not "contiguous and connected to" the live gaming facility as required by section 551.114(4).

OUTCOME: The ALJ rejected the Division and Calder's argument that SCF did not have standing to maintain its unadopted rule challenge. While the ALJ concluded that SCF could satisfy the conventional standing test by demonstrating that it would suffer an injury in fact and that its injury was within the zone of interest to be protected or regulated, he was of the opinion that it was unnecessary for SCF to do so because the unadopted rule had the collateral effect of regulating SCF's industry. That conclusion was based on the holdings in *Televisual Communications, Inc. v. Department of Labor & Employment Security*, 667 So. 2d 372 (Fla. 1st DCA 1995), and *Department of Professional Regulation, Board of Chiropractic v. Sherman College of Straight Chiropractic*, 682 So. 2d 559 (Fla. 1st DCA 1995).

Ultimately, the ALJ found that the renewal of Calder's slot machine license relied upon an unadopted rule. The ALJ rejected the Division's argument that administrative stare decisis required him to follow the contrary result reached by another ALJ in an earlier rule challenge case. "The undersigned regards his fellow ALJs' decisions as persuasive (not binding) authority, deserving of respect, and the undersigned will follow such decisions to the extent possible without abrogating his ethical obligation personally to decide each matter over which he, and he alone, presides." While no objection was raised to Calder's intervention, the ALJ also opined that Calder did not appear to have standing to intervene because "no one has the right to continuous and unbroken enjoyment of benefits under an unadopted rule."

Administrative Law Section

ADMINISTRATIVE LAW SECTION
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(Item # 8011001)

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

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

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

Q&A
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he was Chair of our section. He is certified in Appellate Practice and enthusiastically shared his insights with us. Dan Thompson has been practicing in this field for 45 years and became SFGAP certified nearly ten years ago. He is in the process of renewing his certification for the second time, and his experience remains relevant and his advice is timeless. Angela Morrison is the most recent practitioner to pass the exam, and has since been recruiting others and sharing her study materials. All three of these attorneys have found that studying for the exam and being certified have been helpful for their practices, and they highly recommend that you join them!

If you are interested in learning more about the SFGAP certification process, please visit the Bar's website: https://www.floridabar.org/about/cert/cert-applications-and-requirements/cert-ag/.

Q: How many months prior to the exam did you begin studying?

Judge Gar Chisenhall: I probably fell into the "overdid it" category because I did not take the time to formulate a study plan. When I was preparing to take the appellate practice certification exam, I was the appellate chief at the Florida Department of Business and Professional Regulation, and I was often pulled in several different directions during the course of a single day. As a result, I often worked overtime in order to keep up with my caseload, and I doubted that I would have much time for studying on weeknights and weekends.

In addition to a lack of time, I was also worried about the scope of the exam. While I had a substantial amount of experience with administrative appeals, I had very limited experience in the numerous other fields of appellate practice that were eligible for testing. Therefore, I started very light (but non-structured) studying efforts well over a year prior to my exam. If I had to do it over again, I would still start studying well before the exam but I would do so in a much more structured way.

I believe having a plan for passing a certification exam is essential, and one of the biggest mistakes one can make is waiting until the last minute to learn new material. One should spend the last two weeks prior to the exam doing nothing other than refreshing your recollection of material that you have already mastered. In order to make that happen, I would recommend formulating a plan detailing what topics you will study and when you will study them.

In the process of creating that plan, you need to be honest with yourself about how much time you will realistically be able to devote to studying. There are probably many more demands on your time now (such as family, job, charitable activities, etc.) as opposed to when you were a newly-minted law school graduate preparing for the bar exam.

I would also incorporate some time into your plan for reviewing what you have previously learned. There are likely to be topics on the exam that you have not dealt with in the course of your practice, and reviewing those topics multiple times will be essential to retention. With all of that information in hand, you will then be able to decide when you should start studying.

Dan Thompson: I began studying around three months prior to the exam. I could have been certified based solely on my experience when the certification was first created, but I blew the opportunity to avoid taking the test by waiting too long to start the certification process. After I finished kicking myself, I contacted Judge Francine Ffolkes, a former colleague who had recently taken the test, for advice on how to prepare.

Angela Morrison: Nine months prior to the exam, I listened to a number of CLEs to satisfy the requirements to qualify for taking the exam. I then slowly began to gather written materials, such as Administrative Law Section newsletters and appropriate *Florida Bar Journal* articles as well as copies of the many different statutes and rules covered by the exam. Four months prior to the exam, I began studying more—several hours each week—and began to download helpful articles and summaries available online. For each subject matter, I pulled information together in a notebook and created outlines of the most relevant details. I was almost solely focused on the exam for the two-week period prior to the test date. I developed a structured calendar with specific time allotments on a per-subject matter basis to ensure I had ample time to study each of the topics in depth, and also had time during the two days immediately prior to the day of the exam both to refresh my memory and to focus on areas where I was still struggling.

Q: Approximately how many hours did you study for the exam?

GC: I cannot even give a ballpark estimate about how many hours I spent studying. However, I can say with absolute certainty that if I had formulated a plan for when I would study particular topics, then I would have substantially reduced the overall amount of time that I spent studying.

As an addendum to my answer to the previous question, I believe that you need to know the topics that could be on the exam and allocate your time accordingly. For example, federal appeals can account for up to 20 percent of the questions on the appellate certification exam, and I had very little experience with federal appeals. Therefore, I knew that I had to spend much more time on that subject matter that someone who regularly practiced in federal court. In contrast, I had a substantial amount of experience with administrative appeals and spent virtually no time on that subject matter.

Likewise, if a particular subject area will account for a very small portion of the exam, don't spend a large portion of your study time on that subject area. For instance, 10 percent of the appellate practice certification exam covers the following subject areas: state and federal criminal appeals, state and federal administrative

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appeals, family law appeals, probate appeals, and workers' compensation appeals. Given those percentages, it would not make a lot of sense to devote 20 percent of your study time to probate appeals when probate appeals are likely to account for a miniscule percentage of the total exam questions.

DT: An hour or so three times a week, then more intensively closer to the test day.

AM: While it is a rough estimate, I believe I spent about 400 hours preparing for the exam. Unlike with other certifications, the scope of the SFGAP examination is very broad and there is no single review course or set of materials. The amount of time needed to study for the SFGAP examination could be significantly reduced if we had organized and comprehensive study materials available, and the Section is working on that. ALS members Megan Silver and Gregg Morton have stepped up and are taking the lead on this effort. If you have any materials you believe would be helpful and would like to contribute, please reach out to them at MeganSSilver@gmail.com and greggrileymorton@gmail.com.

Q: Did you find that listening to CDs or podcasts helped you prepare?

DT: While podcasts didn't exist when I was studying, I listened to CDs from CLE seminars designed to help applicants prepare for a prior certification test and from other administrative law CLE seminars, mainly while working out at the gym, travelling, or doing chores, a process that I found to be a very effective way of concentrating. I read the written materials prepared for the CLE seminars as well. I also used the internet to find some federal administrative law materials to read, as the CLE materials did not cover the federal issues very well.

AM: I found the use of podcasts to be extremely helpful. I inadvertently purchased "on-demand" versions of some Florida Bar CLEs, which are available for only 90 days after purchase. "Live" events were not as helpful because that content is available for only 90 days as well. The podcast versions can be downloaded and are then available indefinitely. Like Dan, I listened while doing other things, which certainly helps from a time management perspective.

Q: What was the most surprising thing that happened to you while studying for or taking the exam?

GC: I was surprised that I learned things that I was able to utilize in my day-to-day practice. I was not familiar with the concept of appellate standing prior to studying for the exam, but I used that knowledge to obtain an easy victory in the months leading up to the exam. Also, while immersing myself in the minutia of appellate practice, I gained a new appreciation for how the appellate systems at the state and federal level work. That led to me becoming much more confident in my abilities as an appellate practitioner, and that was surprising because I had been practicing for approximately 15 years prior to taking the exam.

AM: Regardless of whether I passed the exam, I was glad I had made the effort to learn about areas of federal and state administrative law that were new to me and to ensure that I was up to date on the more traditional aspects of Florida administrative law. I felt that the investment was well worth it for my professional development. This was a much different experience than taking the Bar exam. The information I studied for the SFGAP certification was, for the most part, interesting and important for my practice, and I believe it has made me a better, more competent attorney. In addition, I now have good reference materials and resources available at my fingertips when I need a refresher on an issue.

DT: In studying for it, discovering all of the nooks and crannies of state and federal administrative law that were outside of what I considered to be a significant part of the usual administrative law practice. In taking the test, given how long and exhausting the test was—I was wasted by the time I was done, and frustrated by trying to figure out some of the questions that I thought were ambiguous and multiple choice questions

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that I thought had all erroneous or more than one correct answers. After I became certified I was asked to be on a committee reviewing appeals by test takers who were challenging the accuracy of certain approved answers, and found that some of the appeals were over the same questions that I found to be confusing or had offered the same wrong multiple choice answers as those when I took the tests, often challenging them for the same reasons! There were only a few questions and answers like this, but the stress of the test made them memorable.

Q: Did you find that studying for the exam was more like a refresher or were you learning new material?

DT: Some of both, but the new material that I learned was generally in the areas not covered by Chapter 120.

GC: Because so much of my experience involved administrative appeals, I spent a great deal of time learning new material. Given that the practice of law is becoming more and more specialized, I have a feeling that I am not alone in that regard.

AM: While I had been practicing administrative law for nearly 30 years, it was a great, comprehensive review and a way to ensure I was up to date on relatively recent changes to Chapter 120. I also learned a significant amount of new material. Anyone interested in taking the exam should look at the list of subjects being covered. I am sure they will be surprised at the broad scope.

Q: Would you recommend that other practitioners in this area consider studying for and taking the exam?

GC: Absolutely! As an administrative law judge, I have gained an appreciation for what it takes to effectively represent a client. While it seems incredibly simplistic, one of the underappreciated keys to effective representation is just knowing "the rules" (whether they be in statutes, codes, or case law) pertaining to your proceeding. Too many attorneys fail to devote a sufficient amount of time to refreshing their knowledge of those rules, and that can cause an attorney to make serious mistakes. Having a thorough knowledge of "the rules" enhances your credibility. It demonstrates to the court that you know what you are talking about and should be trusted. In contrast, an attorney can lose his or her credibility very quickly by clearly misstating the law or not knowing what he or she is supposed to do at a particular point in a case.

DT: Yes. I think it enhances the professionalism and quality of what we do, and is good for marketing. It also helps focus us on practicing in areas where we feel most confident about providing high quality representation to clients, while at the same time expanding the scope of our expertise.

AM: Agreed. I wish more practitioners in our field would become certified. Whether you are on the opposite sides of the table or working together on the same side, competency matters. Being recognized as certified is a great indicator of skill level and will set you apart from others in your field, which can certainly make an important and beneficial difference.

Q: How did you find CLE programming and other material that you needed to prepare for the exam?

GC: I was very fortunate in that the Appellate Practice Section of the Florida Bar produces a fantastic certification review course every year. There is a good chance that I could have passed the appellate certification exam just by listening to the CDs from that course and by studying the incredibly comprehensive written materials that came with it. However, because Philip Padovano's Florida Appellate Practice manual is known as "the Bible" of Florida appellate practice, I felt that my studying would be incomplete without that. Also, with my lack of experience with federal appeals, I used Amazon to buy one book about federal appellate practice and another about practicing before the U.S. Supreme Court.

DT: Yes. As previously indicated, the Bar's CLE materials were extremely worthwhile as study aids, though there were a few gaps that I needed to fill on my own.

AM: I relied primarily on Florida Bar CLE resources, including materials available through other sections, such as the Environmental and Land Use Law Section and the City, County, Local Government Law Section, as well as the American Bar Association.

Q: Provide an example of how studying for and taking the exam helped your practice.

GC: I learned around Memorial Day of 2015 that I had passed the appellate practice certification exam, and I was appointed to be an administrative law judge approximately one month later. Therefore, I had very little time to handle appeals as a board certified appellate practitioner. Nevertheless, while I no longer write briefs and do oral arguments, my background as an appellate practitioner is a tremendous asset to my current practice. For example, my knowledge about standards of review assists me with ruling on objections and resolving discovery disputes. Also, I feel that I have a very good idea what kind of rulings would be likely to get me reversed and when an appellate court will defer to my judgment.

While not directly related to my exam preparation, I would like to add that my experience writing briefs translated nicely into my current practice of writing recommended and final orders. In my opinion, the most important task of an appellate practitioner and an administrative law judge is to distill a large amount of information into a written document that is coherent and persuasive. Also, the writing styles of a good appellate practitioner and an administrative law judge are very similar in that both try to persuade without doing so in a heavy-handed manner.

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AM: Not long after I passed the exam, I identified a potential problem if more than one county commissioner attended an open house where a new development project was being discussed. I advised my client that we should be careful to identify the commissioners and ensure that only one commissioner attend at a time. While I was generally familiar with Florida's sunshine laws, I had never represented a public board and had not appreciated some of the limitations on board members' communications and interactions. I have also been able to spot more potential Section 1983 causes of action after studying for the exam.

DT: Getting up to speed on federal administrative law in preparation for the test turned out to be very handy, because after I took the test I ended up having two complex multi-week trials in the Southern District grounded in federal APA issues, and I later developed seminar presentations based in part on comparing the practice aspects of federal and administrative law. The experience generally made me more comfortable about taking on cases that were outside of my prior practice experience, and gaining the confidence that I could represent clients competently on those matters rather than having to refer the clients to other counsel.

Q: Are there study groups available for those interested in taking the exam?

AM: I wish I had been part of a study group when I was preparing for the exam—at least to be able to share materials and outlines. Judge Chisenhall and I have been attempting to identify and encourage individuals interested in the exam, and have helped facilitate an informal study group which is forming now. Anyone who is interested is welcome to join. For more information, please reach out to us or to Megan Silver and Gregg Morton.

DT: I was unaware of there being any groups, and I instead had to ask advice from others who had already taken the tests. CLE seminars and written materials were sufficient, in any event.

Q: Do you have any additional advice?

GC: I believe that it is very important to intelligently allocate your limited time. If you lack experience in a topic that is likely to make up a significant portion of the exam, then you need to devote a sufficient amount of time to reading materials on that topic. Again, I think that a plan about what you are going to study and when you are going to study it is essential to maximizing your efficiency and increasing your chances of passing. One of the worst things you can do is attempting to "cram" everything at the last minute. Nevertheless, I highly recommend clearing your schedule for several days prior to the exam in order to review everything you have learned and for traveling to the exam site.

DT: I agree with Gar as to how to prioritize time and subject areas for study.

Q: What additional information do you think would be helpful for practitioners studying for the exam?

AM: Practice questions would be invaluable—allowing the individual to gauge how well their studies are progressing and how prepared they may be to take the exam, and also to identify any weaknesses where additional studying would be most beneficial. Practice questions would also be helpful for test takers to appreciate the level of detail they are expected to know—e.g., whether they need to memorize case names or not.

DT: I agree with Angela, and please include answers too! I don't know what is being provided these days to those preparing to take the tests, but certainly there should be a bibliography of courses, books, and related materials to use as study aids.

Judge Gar Chisenhall is an administrative law judge with the Florida Division of Administrative Hearings. He became certified in Appellate Practice in 2015 and is a past Chair of the Administrative Law Section.

Dan Thompson is of counsel with Berger Singerman, LLP, in its Tallahassee office, "of counsel" meaning he is trying to work less and play more, with intermittent success so far. Since 1981 his primary area of practice has been administrative law, with a particular focus on environmental law. He became SFGAP certified in 2010. He was formerly Deputy Secretary for the Florida Department of Environmental Protection and General Counsel for what was once the Florida Department of Environmental Regulation.

Angela Morrison is a partner with Earth & Water Law, PLLC. She became SFGAP certified in 2018. She was previously with the firm of Hopping Green & Sams and also with Berger Singerman. She primarily practices in the field of environmental law and is currently on the Executive Council of the Environmental and Land Use Law Section. Angela is also an advocate for civil rights and anti-discrimination laws for education and public accommodations, and based on disabilities, sexual orientation, and gender.