ADMINISTRATIVE LAW SECTION

Newsletter

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The Case for *Daubert* in Administrative Hearings

By Tara R. Price

In October 2018, the Florida Supreme Court issued its decision in *DeLisle v. Crane Co.*,[1] and Florida's long and on-again, off-again relationship with the *Frye*[2] and *Daubert*[3] standards has reached an end: Florida is a *Frye* state once again. Or is it? Although the Florida Supreme Court recently decided that *Frye* is the appropriate standard for Florida's state courts, *Daubert* should remain the standard for Florida's administrative tribunals.

A Brief History on *Frye* & *Daubert* in Florida

For decades, the Florida Supreme Court held that the standard for the admissibility of expert testimony in Florida's state courts was governed by the rule set forth in *Frye v. United States*: that expert testimony should be "deduced from a well-recognized scientific principle or discovery, [and] the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[4] Even after the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* held that the revised Federal Rules of Evidence had superseded the *Frye* standard in federal courts, the Florida Supreme Court continued to apply the *Frye* standard in Florida courts.[5]

In 2013, however, the Legislature

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From the Chair

By Judge Gar Chisenhall

By the time this column is published, the majority of my time as Section chair will have been completed. My time as the Section's treasurer, secretary, and chair-elect was invaluable for preparing me to be Section chair. Nevertheless, I have learned a great deal during my tenure as Section chair, and I am devoting this column to sharing that knowledge. There are things that I would do differently if I had a second year as chair, and I hope that this column will be helpful to my successors.

A set of goals is the key to a successful term as chair. These goals should be formulated by the time of the Section's long-range planning meeting. However, I recommend that a chair formulate an initial set of goals several months before the meeting and use the time prior to the retreat to discuss those goals with as many executive council members as possible. Individual meetings with executive council members serve two purposes. First, they give you an opportunity to vet your ideas and receive feedback on how they can

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be improved. Second, asking for the executive council's input and then incorporating that input assists with getting the executive council to buy into your vision for the Section.

While it is tempting to have a long list of goals for your tenure as Section chair, it is not realistic given that your term only lasts one year. With such a short period of time, you run the risk of accomplishing nothing if your attention is not focused on a few achievable goals. Prior to the 2018 long-range planning meeting, I had approximately 12 goals that I wanted to accomplish during my term. Fortunately, I realized prior to the meeting that I was setting the Section up for failure and decided to focus on the three most important goals on my list: doing more to appeal to law students and young attorneys, starting the South Florida chapter, and advocating for a certification exam heavily focused on state administrative law.

When formulating the three or four goals that you want to accomplish during your term, it is vital to identify the issues that are challenging the Section and formulate goals that will help the Section meet those challenges. In other words, focus on the big picture. I learned during my time as chair-elect that the Section's membership was at a 17-year low. While most of our fellow sections were also struggling with declining membership, I felt like we needed to take steps to lay the groundwork for eventually reversing that trend, and the goals mentioned in the preceding paragraph were intended to do that. For example, the Section's leadership was generally in agreement that law students and young attorneys represented the most viable opportunities for growing the Section. In order to appeal to those groups, the Section has begun increasing its law school outreach by having a monthly speaker series for law students at the Florida State University College of Law. The Section has also substantially increased the number of Section-sponsored social events so that young attorneys have opportunities to network with more experienced Section members.

As those who have been on the executive council know, the Section has struggled for years to draw more members from outside Tallahassee. By empowering Section members who live in South Florida to organize their own activities and CLEs via the South Florida chapter, the Section will become more relevant to administrative law practitioners in Dade and Broward counties. I am very confident that the South Florida Chapter will be successful and lead to the establishment of a second chapter in Jacksonville or Central Florida in the near future.

Having a revised certification exam is another part of solving our declining membership. Many of you know that the State and Federal Government Administrative Practice ("SFGAP") exam covers an incredibly broad range of topics and that state administrative law is merely one of those topics. But, the vast majority of our members' practices are exclusively focused on state administrative law. That may be why only a small handful of people have taken the SFGAP exam in recent years. If we can have a certification exam primarily based on state administrative law and if the Section then offers courses to assist members with achieving certification, then I am confident that our membership and the number of people pursuing certification will increase.

Communication is vitally important to the Section's success. As noted above, I strongly encourage future Section chairs to discuss their goals with executive council members well before their terms begin. In addition, the Section chair needs to ensure that necessary communication is occurring between other Section leaders. For example, if the South Florida chapter is planning a social event or a CLE, then the Section chair needs to ensure that the organizers communicate with the social media team so that the event or CLE can be advertised on our social media platforms.

We are very fortunate to have Section leaders who are not shy about organizing in-person meetings and conference calls. While the Section chair cannot attend all of those meetings, it is important for the Section chair to attend as many of them as possible. That helps the Section chair stay apprised of what is happening, and it also lets people know that the hard work they are doing for the Section is being appreciated and recognized.

Before and during your term, I recommend that you confer with past Section chairs. They have a great deal of institutional knowledge and can be invaluable sounding boards. For example, Richard Shoop gave me tremendous advice about potential goals prior to my term, and Jowanna Oates gave me an incredibly detailed manual for accomplishing the various tasks that must be performed by every Section chair. Also, Judge Cathy Sellers described to me how the SFGAP exam originated over ten years ago and corroborated my belief that the Section needed to advocate for an exam that would be more appealing to our fellow Section members.

I also recommend that future Section chairs get the chairs-elect, secretaries, and treasurers involved with what they are doing. This will assist them with becoming ready to be chair and it will facilitate the continuation of whatever plans you initiate during your term. It is especially important that you encourage the chair-elect to begin formulating three or four goals so that he or she can hit the ground running upon becoming chair. For example, our chair-elect, Brian Newman, has been actively engaged in planning an administrative law version of a "trial academy." While all of the details have yet to be finalized as I write this column, the trial academy will be a comprehensive, multi-day seminar designed to teach litigation practice skills to young administrative law practitioners. This program will also make the Section more appealing to young administrative law practitioners.

In addition to getting the officers involved, a Section chair should strive to get as many new people as possible involved with Section activities. When I sent an email blast seeking volunteers for the Section's various

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committees, I was overwhelmed with the number of responses I received. I sincerely regret not finding more ways for those volunteers to contribute, and that is the first thing that I would seek to change if I had a second year as chair.

I have a few suggestions that may assist with new people involved. First, I would ask volunteers for the CLE committee to produce webinars and other inexpensive CLEs without the Florida Bar's assistance. Such CLEs would be easy to produce, inexpensive for the attendees, and a good way to promote the Section. If a certification exam based primarily on administrative law becomes a reality, then there will be a strong demand for certification credits. Second, I would have every committee chair work with their committee members to present a plan at the annual summer meeting for what his or her committee intends to accomplish over the next twelve months. In addition, those plans should call for each committee member to contribute in some meaningful way to implementing the committee's plan.

I hope that this column proves to be a good resource for my successors, and I promise to follow the example of my predecessors and do whatever I can to help my future chairs achieve their goals.

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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 Hearings – Equitable Tolling

Dep't of Fin. Servs., Div. of Workers' Compensation v. Digital Accessories Corp., Case No. 18-4245 (Recommended Order Nov. 7, 2018).

FACTS: The Department of Financial Services, Division of Workers' Compensation ("the Department") is the state agency responsible for ensuring that businesses maintain workers' compensation coverage. On December 6, 2017, the Department served Digital Accessories Corporation ("Digital") with an Order imposing a $27,485.68 fine for failing to have a sufficient amount of coverage. The Order contained a notice stating that Digital had 21 calendar days from receipt to file a petition for an administrative hearing. The Order further specified that failure to timely file such a petition would result in Digital waiving its right to an administrative hearing. No mention was made of a particular time of day by which a petition had to be filed. Digital's representative erroneously assumed that the deadline for timely filing a petition was 11:59 p.m. on December 27, 2017, and Digital's petition was slipped under the door of the Department's headquarters just after 8:00 p.m. that night. In reliance on rule 28-106.104(3), Florida Administrative Code, the Department deemed Digital's petition to have been untimely filed at 8:00 a.m. on December 28, 2017. The rule states in pertinent part that "[a]ny document . . . received after 5:00 p.m. shall be [deemed] filed as of 8:00 a.m. on the next regular business day."

OUTCOME: While finding that Digital's representative "rationally assumed" that Digital had until 11:59 p.m. on December 27, 2017, to file its petition, the ALJ concluded that the untimeliness of Digital's petition could not be excused under the equitable tolling doctrine.

Lakeland Reg'l Health Sys., Inc. & Lakeland Reg'l Med. Ctrs., Inc. v. Dep't of Fin. Servs., Div. of Workers' Compensation, Case Nos. 18-3845 & 18-3846 (Recommended Order Nov. 26, 2018).

FACTS: The Department of Financial Services, Division of Workers' Compensation ("the Division") resolves reimbursement disputes between health care providers and insurance carriers for services rendered to injured workers. Lakeland Regional Medical Center ("LRMC") received "Explanation of Bill Reviews" from a claims administrator on January 12, 2018, and February 16, 2018, notifying LRMC that certain claims had been denied. Section 440.13(7)(a), Florida Statutes, provides a health care provider 45 days to protest such denials by filing a petition with the Division. Rather than filing a timely petition, LRMC asked the claims administrator to reconsider the denials. LRMC did not file a petition until after the 45-day window had expired.

OUTCOME: The ALJ rejected LRMC's argument that its untimely filing could be excused under the equitable tolling doctrine. In doing so, the ALJ concluded that LRMC's effort to resolve the dispute informally by requesting reconsideration did "not constitute an equitable circumstance that prevented the timely filing of a formal petition for reimbursement dispute resolution."

Dep't of Health, Bd. of Clinical Social Work, Marriage & Family Therapy & Mental Health Counseling v. Gabriel Leonardo Tito, M.F.T.I., Case No. 18-3636PL (Recommended Order Nov. 9, 2018).

FACTS: On September 27, 2017, the Department of Health ("the Department") issued an Administrative Complaint against Gabriel Tito's license to practice as a registered marriage and family therapist intern. Mr. Tito received the Administrative Complaint, a cover letter, a proposed settlement agreement, and an Election of Rights form on October 23, 2017. The cover letter and the Administrative Complaint form unambiguously stated that a request for an administrative hearing had to be received by the Department 21 days from the day Mr. Tito received the Administrative Complaint. The Department received Mr. Tito's hearing request on November 20, 2017, 28 days after he received the Administrative Complaint. Because it did not timely receive his hearing request, the Department argued that Mr. Tito waived his right to a formal administrative hearing.

OUTCOME: The ALJ recommended that Mr. Tito's request for a formal administrative hearing be dismissed as untimely. In doing so, the ALJ noted that the "mail box rule" does not apply to "service of an Administrative Complaint or other documents offering a point of entry for administrative proceedings." In addition, the ALJ rejected Mr. Tito's assertions that the equitable tolling doctrine excused the late filing.

Admissibility of Evidence

Palm Beach Cty. Sch. Bd. v. Zedrick Barber, Case No. 17-6849TTS (Recommended Order Nov. 13, 2018).

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FACTS: The Palm Beach County School Board ("the Board") has employed Zedrick Barber as a teacher since 2005. On January 19, 2017, a student attempted to leave Mr. Barber's classroom, and he detained the student by grabbing her backpack. The student's struggles caused her to fall to the floor outside the classroom door. Mr. Barber then grabbed the student by the wrist and ankle and dragged her back into the classroom. The Board issued an Administrative Complaint seeking to suspend Mr. Barber for 15 days and to terminate his employment.

OUTCOME: Mr. Barber objected to the ALJ accepting into evidence a video of his interaction with the student in the hallway outside his classroom. According to Mr. Barber, the video from the school's recording system was unauthenticated, lacked a proper chain of custody, and was unduly prejudicial. The ALJ rejected the authentication argument because the student's identification of herself and Mr. Barber in the video constituted prima facie evidence of the video's authenticity. At that point, the burden shifted to Mr. Barber to present evidence demonstrating that the video was unauthentic, and he failed to do so. As for the chain of custody objection, the ALJ ruled that the Board established the chain of custody through the testimony of school personnel, local police officers, and attorneys within the Board's general counsel's office who, at some point, had possession of the video. With regard to the argument that the video was unduly prejudicial, the ALJ ruled that the video was "helpful in clarifying and supplementing the testimonial evidence of the witnesses." Ultimately, the ALJ recommended that the Board suspend Mr. Barber but not terminate his employment.

Rule Challenges

GBR Enters., Inc. v. Dep't of Revenue, Case Nos. 18-4475RX, 18-4992RU and 18-2772 (Recommended and Final Orders January 14, 2019).

FACTS: GBR Enterprises ("GBR") owns and operates approximately 280 vending machines located in Broward, Palm Beach, and Miami-Dade County schools. GBR has written agreements with some of the schools, and those agreements specify that GBR has received a license to install vending machines on school property in exchange for a commission. That commission is a percentage of GBR's gross receipts. After auditing GBR's operations between January 1, 2012, and December 31, 2014, with an audit planning tool or checklist known as the "Standard Audit Plan, Vending and Amusement Machines" ("the SAP"), the Department of Revenue ("the Department") notified GBR via a draft assessment that it owed additional tax of $28,589.65. The Department's draft assessment did not account for any tax on the commissions paid by GBR to the schools. However and pursuant to rule 12A-1.044(5)(a), Florida Administrative Code, the Department reconsidered its initial decision and determined that the commissions paid to the schools should be taxed. The rule provides in pertinent part that "[t]he location owner shall collect the tax from the machine operator on the amount the location owner receives for the lease or license to use the real property." The Department ultimately notified GBR that it owed additional taxes and interest of $288,933.31, and GBR filed a petition challenging the Department's proposed assessment. GBR filed a second petition alleging rule 12-A-1.044 was an invalid exercise of delegated legislative authority and a third petition alleging the SAP was an unadopted rule.

OUTCOME: The ALJ concluded that the statutes cited as rulemaking authority did not address the subject matter at issue and rejected the Department's argument that statutes conferring only general rulemaking authority provide specific authority for a rule. Therefore, the ALJ concluded that rule 12A-1.044(5)(a) was an invalid exercise of delegated legislative authority. However, the ALJ concluded that the SAP was not an unadopted rule because Department employees are not bound to follow it. The ALJ ultimately recommended that the Department completely rescind the tax assessment.

Bid Protests

AHF MCO of Fla., Inc., d/b/a PHC Fla. HIV/AIDS Specialty Plan, et al v. AHCA, et al., Case Nos. 18-3507, 18-3508, 18-3512, 18-3511, 18-3513, and 18-3514 (Recommended Order Nov. 19, 2018).

FACTS: On July 14, 2017, the Agency for Health Care Administration ("AHCA") issued 11 invitations to negotiate ("ITNs") in order to select Medicaid managed care plans for 11 different regions of Florida as defined by section 409.966(2), Florida Statutes. While the ITN indicated that responses would be ranked via scores assigned by a single evaluator, AHCA did not assign entire responses to a single evaluator for review. Instead, AHCA assigned different evaluators to evaluate sections of the ITN responses that AHCA considered those evaluators qualified to score. After evaluating over 230 responses to the 11 ITNs, AHCA announced its decision on April 24, 2018. The Governor's office received emails and letters two days later criticizing AHCA's decision to not negotiate with AHF MCO of Florida, Inc. ("Positive"). Positive filed a petition for formal administrative hearing on May 4, 2018, arguing in part that AHCA should reject all proposals and re-start the procurement process.

OUTCOME: During the formal administrative hearing, the ALJ rejected AHCA's argument that Positive committed a "cone of silence" violation by not adhering to an ITN provision that prohibited respondents to the solicitation "or persons acting on their behalf" from contacting an executive or legislative branch employee about the solicitation between the release of the ITN and 72 hours fol-

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lowing AHCA's issuance of the notice of intended award. Because AHCA did not exercise its discretion during the ITN evaluation process and reject Positive's response based on the alleged cone of silence violation, the ALJ concluded that the Administrative Procedure Act precluded AHCA from raising a new reason for rejecting Positive's ITN response. As for Positive's argument that AHCA violated the ITN's terms because each response was not ranked by an individual evaluator, the ALJ found that AHCA's ranking was "contrary to the ITM specifications." As stated by the ALJ, "[t]he result is a decision that is arbitrary and capricious. The facts here leave the definite and firm conviction that [AHCA] committed a consequential mistake when it used a different ranking system than the system described in the ITN." Ultimately, the ALJ recommended in part that AHCA enter a final order rejecting all of the ITN responses to provide Medicaid managed care plans for patients with HIV/AIDS in Regions 10 and 11.

In a Final Order rendered on December 21, 2018, AHCA rejected the ALJ's determination that the ITN required that each response be ranked by evaluator. In doing so, AHCA ruled that the ALJ's interpretation of the ITN's terms was erroneous. AHCA also ruled that Positive had no standing to raise any challenge because its cone of silence violation rendered it a non-responsive bidder.

Positive has appealed AHCA's Final Order to the First District Court of Appeal.

APPELLATE CASE NOTES

by Gigi Rollini, Tara Price, and Larry Sellers

Appellate Review—Jurisdiction to Review a Final Order and Definition of "Party"
FRS-Fast Reliable Seaway, LLC v. Bd. of Pilot Comm'rs, 261 So. 3d 744 (Fla. 3d DCA 2018).

The Pilotage Rate Review Committee (Committee), a committee of the Board of Pilot Commissioners, sets pilotage rates at various ports throughout the state. The Committee consolidated two competing petitions—one from a trade association for cruise line companies seeking a decrease in pilotage rates, and one from an association representing harbor pilots seeking an increase in pilotage rates. After a hearing on the consolidated petitions, the Committee issued a notice of intent to approve an increase to pilotage rates. Both the cruise line association and the harbor pilot association requested a formal administrative hearing before an ALJ. FRS-Fast Reliable Seaway, LLC (FRS) did not object to the rates noticed in the Committee's notice of intent and did not request an administrative hearing.

The ALJ concluded that the Committee had not properly complied with Florida statutes in issuing its notice of intent, terminated the administrative proceedings, and relinquished jurisdiction to the Committee to address its statutory obligations. The Committee then issued a corrected notice of intent. The cruise line association and harbor pilot association subsequently entered into settlement negotiations and did not seek administrative review of the Committee's corrected notice of intent. FRS also did not object to the rates noticed in the Committee's corrected notice of intent and did not request an administrative hearing.

The cruise line association and harbor pilot association presented their proposed settlement to the Committee at a publicly noticed meeting. The Committee approved the rates within the agreement, which were different than the proposed rates in the Committee's corrected notice of intent, and issued a final order. FRS filed a writ of certiorari in the district court to challenge the final order, arguing that it never received the designated point of entry into administrative proceedings to which it was entitled under section 310.151, Florida Statutes.

The court concluded that it lacked standing to adjudicate FRS's writ for certiorari relief, noting that the court's jurisdiction to review an administrative final order subject to the Administrative Procedure Act derives from either Florida Rule of Appellate Procedure 9.030(b)(2) or section 120.68, Florida Statutes. The court observed that Rule 9.030(b)(2) expressly states that the district courts have jurisdiction over non-final administrative orders and final orders of the circuit courts. The rule does not authorize district court review of the Committee's final administrative order.

The court also analyzed its jurisdiction under section 120.68, which permits judicial review for parties

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who are affected by final agency action. The term "party" is defined by section 120.52(13), Florida Statutes, as a person whose substantial interests are being determined; who has a constitutional, statutory, or regulatory right to participate in the proceeding, or a substantial interest that is affected by the proposed agency action, and who has made an appearance as a party; or who was permitted by the agency to intervene or participate in the proceeding as a party. The court stated that although the Committee's final administrative order might have adversely affected FRS, the district court lacked jurisdiction under section 120.68 because FRS did not qualify as a "party" under section 120.52(13).

Thus, the court dismissed FRS's petition for lack of jurisdiction. The court noted, however, that FRS could obtain review of the Committee's final administrative order by filing an action for declaratory judgment and/or injunction in state circuit court.

Elections—Candidate Qualifications
Torrens v. Shaw, 257 So. 3d 169 (Fla. 1st DCA 2018).

Ryan Torrens' opponent, Sean Shaw, filed a complaint against him alleging that prior to submitting his qualifying check, Torrens' campaign received a contribution of $4,000 from his wife. The complaint alleged that it was a prima facie violation and that prior to that contribution his campaign account did not hold enough funds to cover the fee. The complaint also alleged that Torrens acted in bad faith in attempting to qualify through a fraudulent act.

The circuit court entered final judgment granting declaratory and injunctive relief, finding that Torrens knowingly possessed the unlawful funds for more than a month. The court found that, but for the $4,000 in the account, the required qualifying check would not have cleared and Torrens would not have qualified for the ballot. It was not disputed that Torrens submitted, on time, all items that are required to qualify as a candidate for the Democratic nomination for Attorney General per 99.061(7), Florida Statutes. Shaw's allegations and the circuit court's ruling were instead focused on the source of the funds that were in Torrens' campaign account. Pursuant to section 106.19(1), Florida Statutes, it is a first degree misdemeanor to accept a contribution in excess of the limits in section 106.08.

The district court therefore reversed, holding that a private citizen's allegation of a violation of chapter 106, Florida Statutes, has no bearing on whether a candidate has properly qualified for office under section 99.061(7).

Ethics Commission—Jurisdiction on Annual Financial Disclosures
Scott v. Hinkle, 259 So. 3d 982 (Fla. 1st DCA 2018).

Donald Hinkle filed a complaint to challenge the annual financial disclosures that Governor Rick Scott filed with the Florida Commission on Ethics (Commission). After the complaint was filed in circuit court, the Governor filed a motion to dismiss the complaint, stating that only the Commission has jurisdiction to review complaints involving financial disclosure under article II, section 8(f) of the Florida Constitution. The circuit court denied the motion to dismiss, which prompted the Governor to file a writ of prohibition that challenged the circuit court's jurisdiction.

The court granted the petition for writ of prohibition and concluded that Florida law assigns exclusive jurisdiction to the Commission to review such complaints. Because article II, section 8(f) of the Florida Constitution establishes that the Commission has "independent" authority to investigate and report on "all complaints" involving public officer/public trust issues, with no secondary complaint-resolving authority granted to Florida's circuit courts, prohibition was warranted. The court, citing section 112.3241, Florida Statutes, concluded that the only judicial review provided for by law in this area is of a final action by the Commission, in a district court of appeal.

Proposed Rule Challenge—Determination of Location of New Trauma Centers
Dep't of Health v. Shands Jacksonville Med. Ctr., Inc., 259 So. 3d 247 (Fla. 1st DCA 2018).

Shands Jacksonville Medical Center, Inc. d/b/a UF Health Jacksonville and several other health systems and hospitals (collectively referred to as Shands) challenged the validity of four proposed rules that changed the scoring system by which the Department of Health (DOH) determined the number of trauma centers needed per trauma service area. In 2014, DOH implemented a scoring system that would result in the maximum number of trauma centers for each trauma service area. Concerned that over time some trauma service areas would have a maximum need for zero trauma centers, DOH sought to revise the rules in 2016 so that the resulting scores would be considered a minimum score, as opposed to a maximum score. After an administrative hearing, the ALJ ruled that the proposed rules contravened the implementing statutes and vested unbridled discretion in DOH to determine the location of new trauma centers. DOH appealed the ALJ's final order.

During the pendency of the appeal, the Legislature significantly amended the proposed rules' implementing statutes to provide that only the Legislature, and not DOH, has the authority to determine and establish the number of trauma centers per trauma service area. The statute was so substantially amended that the statutory basis for the proposed rules was eliminated. Thus, the court held that the proposed rule challenge was now moot. The court elected to decide the merits of the case, however, because the challengers may have had a possible right to attorney's fees.

The court disagreed with the ALJ's final order in three aspects. First, the court concluded that the proposed rules would not conflict with

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the prior statutes simply because multiple trauma service areas might have a need for an additional trauma center. The prior statutes directed DOH to establish the approximate number of trauma centers to ensure reasonable access, and the proposed rules did not render the prior statutes' directives meaningless. Second, the proposed rules' allocation of potential trauma centers among the state's trauma service areas did not implicitly supersede the prior statute simply because the statute had set a minimum number of trauma centers per trauma service area and a maximum number of trauma centers for the state. And third, the court held that the proposed rules did not vest unbridled discretion with DOH for the determination of new trauma center locations. The prior statute gave DOH "wide berth" to make "pure policy decisions," which supported DOH's interpretation of a trauma service area's need under either the existing or proposed rules. Accordingly, the court reversed the ALJ's final order.

Public Records—Surveillance Techniques Exemption
Exec. Office of the Governor v. AHF MCO of Fla., Inc., 257 So. 3d 612 (Fla. 1st DCA 2018).

AHF MCO of Florida, Inc. (AHF) submitted a public records request to the Governor's Office asking for numerous records, including copies of the Governor's electronic and hard-copy calendars for the upcoming three months, as well as all documents and records showing where the Governor would reside and travel during that time. The Governor's Office responded that it would not produce the public records pursuant to section 119.071(2)(d), Florida Statutes, which exempts from disclosure "information revealing surveillance techniques or procedures or personnel."

AHF filed a petition for writ of mandamus in the trial court, which issued an order to show cause. The Governor's Office responded, arguing that premature disclosure of the Governor's schedule would reveal surveillance techniques and jeopardize the Governor's security. The Governor's Office also attached an affidavit from an FDLE special agent in support of its response. Without inspecting the records, the trial court granted mandamus relief and ordered the Governor's Office to produce the records. The Governor's Office appealed the trial court's order.

The court held that a trial court generally could not determine whether a public records exemption applies without inspecting the records in camera. The court noted that the FDLE agent's affidavit was undisputed and determined that any records that revealed the Governor's drive times, or arrival and departure times, were exempt under the statute. The court, however, required that other records falling within AHF's public records request must be produced to the trial court for an in camera inspection, after which the trial court would determine whether the records are exempt from disclosure. Thus, the court reversed and remanded the case for additional proceedings.

Public Records—Alleged Claim of Violation Not Moot Because Records Were Provided After Suit Was Filed
O'Boyle v. Town of Gulf Stream, 257 So. 3d 1036 (Fla. 4th DCA 2018).

Martin O'Boyle made public records requests for (1) copies of bills and payments from the Town of Gulf Stream's (Town) attorney; and (2) copies of text messages sent or received by the Town Mayor since his appointment. Subsequently, O'Boyle filed a complaint alleging that the Town unlawfully redacted copies of the attorney's bills and payments pursuant to the work product exemption of the Public Records Act. After filing a motion for the trial court to conduct an in camera inspection of the records, the Town produced a complete set of bills and payments with no redactions. O'Boyle's complaint also alleged that the Town had deliberately concealed public records by producing an incomplete set of text messages designed to make O'Boyle look bad.

The Town moved to dismiss O'Boyle's claims, arguing that (1) O'Boyle's claim with regard to the attorney's bills and payments was now moot; and (2) O'Boyle had not properly pled a claim with regard to the Town Mayor's text messages. The trial court dismissed O'Boyle's complaint and allowed him time to amend. O'Boyle instead asked for a final judgment and appealed the trial court's dismissal of his complaint.

First, with regard to the Town's production of its attorney's bills and payments, the court ruled that O'Boyle's claim was not moot. Although the Town had provided the complete requested documents, collateral issues affecting the parties' rights remained. Specifically, the trial court had not yet made any determinations as to whether the Town's initial redactions to the bills and payments were proper, and if not, whether O'Boyle was entitled to any reasonable attorney's fees, costs, or expenses as a result.

Second, with regard to the Town Mayor's text messages, the court held that O'Boyle had properly pled a claim under the Public Records Act. Although many of the Town Mayor's text messages could include personal or private information or information exempt from disclosure under the Public Records Act, the court ruled that the Town's lack of disclosure required the trial court to conduct a judicial review of all requested text

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messages to determine which messages were subject to disclosure and which messages were either private or exempted from production under the Public Records Act. The court reversed the trial court's dismissal of O'Boyle's Public Records Act claims and remanded the case for further proceedings.

Public Records—Contempt Order Not Authorized for Violations of the "Spirit" of an Earlier Order
Dep't of Health v. Rehab. Ctr. at Hollywood Hills, LLC, 259 So. 3d 979 (Fla. 1st DCA 2018).

The Rehabilitation Center at Hollywood Hills, LLC (Center) made a public records request to the Department of Health (DOH) for the death certificates for all Floridians who died between September 9 and 16, 2017. DOH responded that death certificates were vital records, and that the Center would need to follow the process under chapter 382, Florida Statutes, which required a form containing the decedent's name for each death certificate requested. The Center countered that it was making a request pursuant to the Public Records Act in chapter 119, Florida Statutes, and thus, it did not need to comply with the forms required under chapter 382. DOH refused to provide the records.

The Center filed a petition for mandamus relief. The trial court held a hearing and ruled that the death certificates were public records and DOH was required to provide them if the Center used a single form under chapter 382, specifying the applicable date range. DOH was ordered to comply with any future requests from the Center that were in substantial compliance with the trial court's ruling. The Center sent DOH a new public records request, and DOH informed the Center that it would need to review the records and redact any confidential or exempt information. DOH provided a cost estimate and required payment prior to producing any records.

The Center complained that DOH's cost estimate was excessive, as only the cause of death needed to be redacted on the certificates, and the Center moved to enforce the trial court's final judgment. The trial court held DOH in contempt for its failure to comply with the trial court's order and ordered the production of 5,907 death certificates within 48 hours. DOH appealed the trial court's order.

The court reversed the trial court's contempt order, holding that the trial court's final judgment was not clear enough as to DOH's obligations. Although the final judgment required DOH to produce death certificates in response to the Center's future public records requests, the final judgment did not address whether those death certificates were subject to any redactions.

The court noted that several provisions in chapter 382 prohibit DOH from releasing information that is confidential or exempt from disclosure. Trial courts are required to be explicit and precise in their orders and may not hold a party in contempt for failing to abide by the spirit of an order that was not specific enough with regard to the party's responsibilities. Accordingly, the court reversed the trial court's order holding DOH in contempt.

Tax Exemptions
Int'l Academy of Design, Inc. v. Dep't of Revenue, 44 Fla. L. Weekly D147 (Fla. 1st DCA Dec. 31, 2018).

The International Academy of Design, Inc. and The International Academy of Merchandising and Design, Inc. (Academies) challenged a final order from the Department of Revenue (DOR) that determined they were not eligible for tax exemptions from 2010 to 2013.

Sections 212.0602 and 212.031(1)(a)9., Florida Statutes, provide certain tax exemptions for "any entity, institution, or organization that is primarily engaged in teaching students to perform any of the activities or services described in s. 212.031(1)(a)9.," as well as "property used as an integral part of the performance of qualified production services." The statute defines "qualified production services" as "any activity or service performed directly in connection with the production of a qualified motion picture." The statute then goes on to define these activities and services through a listing in its sub-subparagraphs a. and b.

The parties took differing views on the scope of the exemptions. The Academies argued that the activities listed in sub-subparagraphs a. and b. are the activities that qualify as the "activities or services described" later in the statute, and that the section 212.0602 exemption was not also confined by the section 212.031(1)(a)9. requirement that the exemption be only for "property used as an integral part of the performance of qualified production services," namely those performed directly in connection with the production of a qualified motion picture.

DOR argued that the word "describe" was synonymous with "define," not with the lists enumerated later in the statute, so that the statute refers to not just any activities listed in the sub-subparagraph, but only those which are "performed directly in connection with the production of a qualified motion picture." DOR's argument therefore was that the statute does not provide any tax exemptions for an educational institution that is primarily engaged in teaching photography, sound and recording, creation of special effects, animation, but rather only those activities and services that were taught "directly in connection with the production of a qualified motion picture."

The court affirmed DOR's interpretation of the law, while finding that both interpretations were reasonable. The court explained that an administrative agency's interpretation of a statute that it is tasked with enforcing is entitled great deference. The court held that if the agency's interpretation is one of several, the agency's interpretation must be upheld despite the existence of reasonable alternatives. (The court noted, however, that the 2018 passage of an amendment to the Florida Constitution would prevent the court from

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deferring to an agency interpretation of a statute effective January 8, 2019).

Thus, the court concluded that the Academies were required to prove that their students performed certain activities and services directly in connection with the production of a qualified motion picture. In so stating, the court noted that tax exemptions are strictly interpreted against the tax payer.

Judge Winokur specially concurred to question the maxim that statutes providing exemptions from a general tax are strictly construed against the taxpayer, rather than construing them like all other statutes that should be interpreted fairly and reasonably to ensure their meaning is fulfilled.

Unadopted Rule Challenge—Taxing Tobacco Wraps
Grabba–Leaf, LLC v. Dep't of Bus. & Prof'l Regulation, 257 So. 3d 1205 (Fla. 1st DCA 2018).

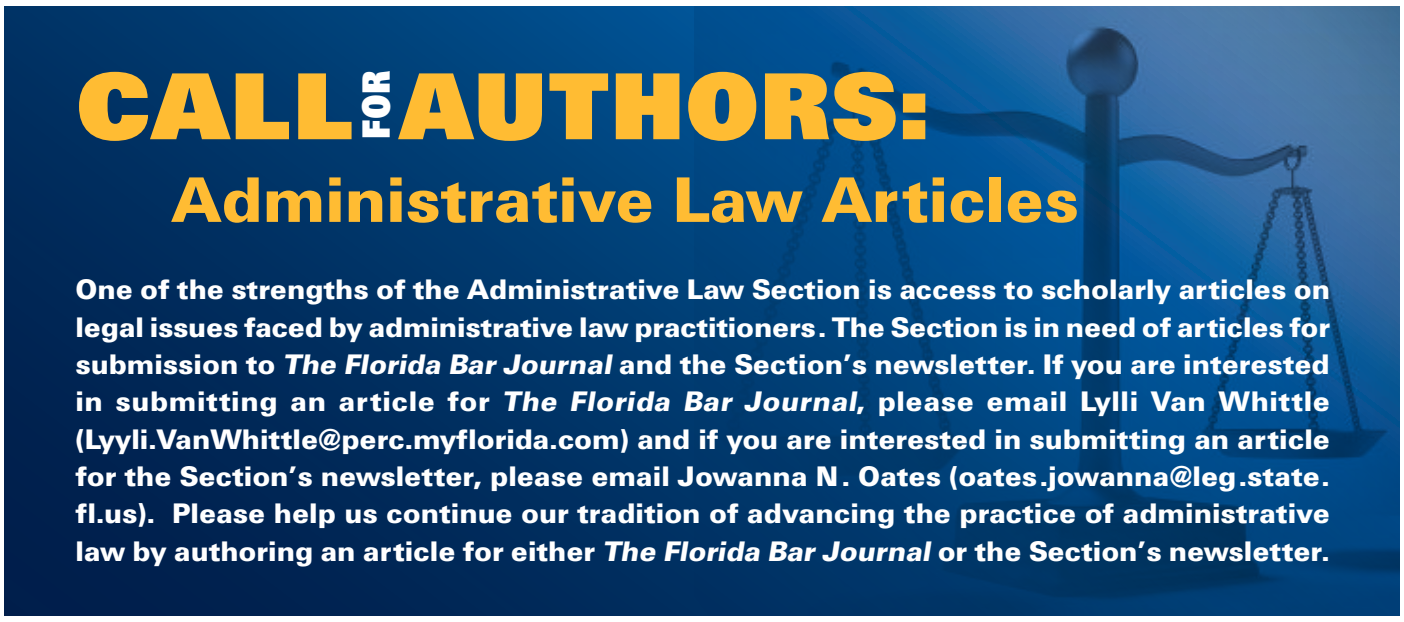
An unadopted rule challenge was filed by Grabba-Leaf, LLC after the Florida Department of Business and Professional Regulation (DBPR) issued a memorandum stating that DBPR would no longer tax "homogenized tobacco wraps," but would continue taxing "whole leaf" tobacco wraps as "tobacco products." DBPR interpreted whole leaf wraps to qualify as "loose tobacco suitable for smoking" under the statute's definition of "tobacco products." After a hearing, the ALJ concluded that DBPR's memorandum applied the plain meaning of a clear and unambiguous statute to Grabba-Leaf's wraps, and that it was apparent that whole leaf, non-homogenized cigar wraps met the statutory definition of loose tobacco suitable for smoking.

Grabba-Leaf sought appellate review arguing that DBPR's interpretation of the statute required formal agency rulemaking, and not just a memorandum to all tobacco distributors, where the policy and practice in the memorandum made new distinctions between taxable and non-taxable wraps and altered tax policy. Grabba-Leaf's argument was not that their wraps cannot be taxed as tobacco products, but that DBPR is required by law to initiate rulemaking before it can apply that tax to its whole leaf tobacco wraps because it was not clear that they are "loose tobacco suitable for smoking." Grabba-Leaf also argued that DBPR did not merely reiterate a law or declare what is "readily apparent" from the text of a law, or simply interpret statute and enforce the opinion in *Brandy's Prods., Inc. v. Dep't of Bus. & Prof'l Regulation*, 188 So. 3d 130, 133 (Fla. 1st DCA 2016).

The court agreed with Grabba-Leaf and reversed the administrative decision. The court concluded that DBPR's 2016 memorandum that set forth its post-*Brandy*'s intention to tax only whole leaf blunt wraps was not a simple reiteration of what is "readily apparent" from the text of statute, but represented a tax policy change for DBPR that required rulemaking. The court found that DBPR's memorandum setting forth a policy to tax whole leaf non-homogenized blunt wraps constituted an unadopted and unenforceable administrative rule.

Gigi Rollini *is a shareholder with Stearns Weaver Miller, P.A., in Tallahassee, and was assisted by* ***Madison Harrell****, a paralegal with Stearns Weaver Miller, P.A., in Tallahassee.*

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



Administrative Law Section Calendar of Events

March 7, 2019	Webinar	Ginny Dailey: Declaratory Statements
March 13, 2019	12:30 - 1:30 p.m.	ALS Luncheon Speaker Series: Topic TBD Florida State University College of Law – Roberts Hall *(Lunch will be provided)*
March 21, 2019	Webinar	Marti Chumbler: Open Meetings
April 4, 2019	Webinar	Tobey Schultz: Licensing
April 12, 2019		Deadline for submission of articles to Newsletter Editors
April 19, 2019	Webinar	Fred Springer: Procurement and Bid Protests
June 28, 2019	1:00 - 3:00 p.m.	Administrative Law Section Executive Council Meeting Florida Bar Annual Convention - Boca Raton, Florida

Law School Liaison

Spring 2019 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of our College of Law students. It also lists the rich set of programs the College of Law is hosting during the Spring 2019 semester.

Recent Student Achievements

Congratulations to the following students who are currently completing externships in environmental and administrative law:

- Allison Barkett – Department of Environmental Protection
- William Hamilton – City of Tallahassee, Land Use
- Race Smith – Blueprint 2000
- Daumantas Venckus – NextEra Energy (Juno Beach)

Spring 2019 Events

The College of Law will host a full slate of environmental and administrative law events and activities during the spring semester.

Energy Resilience Panel

This panel discussion, held on January 23, 2019, and organized by Professor Shi-Ling Hsu, explored issues related to energy resilience. Participants included Sara Rollet Gosman, Associate Professor of Law, University of Arkansas School of Law; Kevin B. Jones, Director, Institute for Energy and the Environment, and Professor of Energy Technology and Policy, Vermont Law School; Romany Webb, Senior Fellow and Associate Research Scholar, Sabin Center for Climate Change Law, Columbia Law School; and James Van Nostrand, Director, Center for Energy and Sustainable Development, and Professor of Law, West Virginia University College of Law. Robert Scheffel "Schef" Wright, shareholder at Gardner, Bist, Bowden, Bush, Dee, LaVia & Wright, moderated.

Spring 2019 Environmental Distinguished Lecture

Richard Revesz, Lawrence King Professor of Law and Dean Emeritus, New York University School of Law, presented our Spring 2019 Environmental Distinguished Lecture titled, "Institutional Pathologies in the Regulatory State: What Scott Pruitt Taught Us About Regulatory Policy" on February 6, 2019.

Environmental Law Guest Lectures

Tara Righetti, Associate Professor of Law, University of Wyoming College of Law, presented a guest lecture titled, "The Reluctant Environmental Agency," on February 20, 2019.

Bruce Huber, Professor of Law and Robert & Marion Short Scholar, University of Notre Dame Law School, will present a guest lecture titled, "Negative Value Property," on March 6, 2019, at 12:30 p.m. in room 208.

Michael Gray, Attorney, Appellate Division, Environment and Natural Resources Division, U.S. Department of Justice, will present a guest lecture titled, "Navy Sonar and the Marine Mammal Protection Act," on March 27, 2019, at 12:30 p.m. in room 208.

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

Do You Have a Suggested Change to the Uniform Rules?

Do you have a suggested change to the Uniform Rules of Procedure? If so, please pass it along to Larry Sellers or one of the members of the Section's ad hoc committee that will be considering recommended updates to these rules: Paul Drake, Seann Frazier, Shaw Stiller, Judge Yolonda Green, Judge Elizabeth McArthur, Judge Li Nelson, or Judge Dave Watkins. Larry's e-mail address is: **larry.sellers@hklaw.com**.

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 this newsletter. As in 2013, any amendments to the Uniform Rules must be formally proposed and adopted by the Administration Commission before they may become effective.

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amended section 90.702, Florida Statutes, to make clear that the *Daubert* standard should also apply in Florida. The amended statute reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.[6]

Understandably, Florida's circuit courts began to use *Daubert* in civil trials.[7] In February 2017, however, a divided Florida Supreme Court declined to adopt the Legislature's changes to section 90.702, to the extent they were procedural.[8] Subsequently, the Florida Supreme Court was called upon to determine whether section 90.702 "infringes on th[e] Court's rulemaking authority."[9]

The Court Reinstates *Frye* for Civil and Criminal Cases

In *DeLisle v. Crane Co.*, the Florida Supreme Court held that, despite the Legislature's changes to section 90.702, *Frye* is the proper standard for the admissibility of expert testimony in Florida courts.[10] But the *DeLisle* Court did not hold that section 90.702 was unconstitutional in all applications. Despite *Delisle*, *Daubert* lives on in administrative proceedings.

Pursuant to article II, section 3 of the Florida Constitution, the principle of separation of powers, no branch of government may intrude upon an exclusive province of another branch.[11] The Legislature has the authority to enact substantive law, but procedural law is firmly under the authority of the Supreme Court.[12] The Florida Evidence Code has both substantive and procedural provisions.[13] "Substantive law creates, defines and regulates rights, while procedural law is the legal machinery by which substantive law is made effective."[14]

First, the Supreme Court determined that section 90.702 was not substantive, but procedural.[15] The Supreme Court stated that section 90.702 "does not create, define, or regulate a right," but instead is a statute "that solely regulates the action of litigants in court proceedings."[16] Next, the Supreme Court concluded that section 90.702 was unconstitutional because it conflicted with the Supreme Court's earlier procedural decisions for the admissibility of expert testimony.[17] Thus, because the Supreme Court determined that section 90.702 was procedural, and it conflicted or interfered with the Supreme Court's established procedural mechanisms, it was unconstitutional pursuant to the Florida Constitution's provisions for the separation of powers.[18]

Daubert Remains the Standard in Administrative Proceedings

Notably, however, the Supreme Court's holding in *DeLisle* is limited "to the extent of the conflict."[19] Thus, the Florida Supreme Court did not prohibit all uses of *Daubert* in Florida. Indeed, the *Daubert* standard lives on—and should continue to live on—in Florida's administrative proceedings under chapter 120, Florida Statutes.

In holding section 90.702 unconstitutional, the *DeLisle* Court cited article II, section 3 and article V, section 2(a) of the Florida Constitution. But these provisions are not implicated when the issue is limited to the admissibility of expert testimony in a Division of Administrative Hearing (DOAH) proceeding.[20] DOAH, of course, is a province of the executive branch (and a creature of statute), not the judicial branch.[21] Thus, section 90.702 "would still apply in administrative proceedings under Chapter 120, Florida Statutes, which are not governed by rules of procedure promulgated by the Florida Supreme Court."[22]

Thus, post-*DeLisle*, *Daubert* conflicts and is unconstitutional only to the extent of its use in Florida's civil and criminal courts. Because the *DeLisle* Court did not expressly hold that *Daubert* was unconstitutional in all aspects (and, in fact, indicated the contrary because it cited cases holding that statutes were "unconstitutional to the extent of the conflict"), *Daubert* is still constitutional in other applications, such as its use in administrative proceedings under chapter 120. Even if the *DeLisle* Court's ruling could be stretched to argue that the use of *Daubert* in an administrative proceeding is unconstitutional, any argument to that effect would merely be dicta. The Supreme Court was not called upon to, and did not, determine the constitutionality of the use of *Daubert* in administrative proceedings under chapter 120.

Even If the Rules of Evidence Are Generally Discretionary, *Daubert* Should Apply

Prior to *DeLisle*, the First District Court of Appeal held that *Daubert* applies in administrative proceedings under chapter 120.[23] In *SDI Quarry a/k/a Atlantic Civil, Inc. v. Gateway Estates Park Condominium Association*, the Gateway Estates Park Condominium Association filed a petition pursuant to the Florida Construction Materials Mining Activities Administrative Recovery Act, which allows individuals to seek damages for injury resulting from blasting activities. The Association argued that SDI Quarry damaged the lake through its use of explosives over a period of several years. During the administrative hearing, an expert witness for the Association testified that vibrations from SDI Quarry's blasting activities caused the damage to the lakeshore. SDI Quarry objected to the expert's testimony on several grounds, but did not raise a *Daubert* objection.[24]

After the ALJ issued a Final Order awarding damages, SDI Quarry appealed, arguing that the Final Order should be reversed because,

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in part, the Association's expert witness did not meet the standard under Section 90.702, Florida Statutes, and *Daubert*. The First District stated that even though the Florida Supreme Court had declined to adopt the *Daubert* standard to the extent it was procedural, *Daubert* still applied in administrative proceedings because such proceedings are not controlled by the Florida Supreme Court's rules of procedure. The court then concluded that "the *Daubert* standard would apply" in this case, but SDI Quarry's *Daubert* argument was not preserved on appeal because it never made a *Daubert* objection or requested the ALJ for a *Daubert* hearing.[25]

Some administrative law practitioners may wonder how *SDI Quarry* squares with the Florida Supreme Court's 2017 opinion in *Florida Industrial Power Users Group v. Graham*,[26] which held that the Public Service Commission (PSC) had the discretion to determine whether the Florida Evidence Code—and specifically, the rule on witness sequestration—applied in its administrative proceedings.[27] In *Graham*, the Supreme Court stated that the "general rule" is that "the Florida Evidence Code does not strictly apply to administrative proceedings."[28] The Supreme Court noted, however, that "the rules of evidence are . . . generally applicable and can be modified based on the [administrative body's] discretion."[29] The Supreme Court also stated that "the APA contains its own guidance regarding the admissibility of evidence—including testimony—which is found in section 120.569(2)(g)."[30]

Section 120.569(2)(g) states:

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

Quite frequently, practitioners will cite section 120.569(2)(g) for the proposition that evidence not "admissible in a trial in the courts of Florida" should automatically be admissible under the statute, without regard to the statute's other requirement that irrelevant, immaterial, and unduly repetitious evidence should be excluded. In addition, section 120.569(2)(g) explicitly requires that evidence must be "of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs" to be admissible in an administrative proceeding. This requirement that evidence be reliable permits practitioners to introduce arguments regarding evidence's admissibility under the Florida Evidence Code.[31]

Thus, the *Graham* ruling did nothing to change the longstanding principle that "administrative practitioners may use the Florida rules of evidence to attack or support whether documents or testimony are sufficiently *reliable* to support a finding of fact."[32] Even Charles Ehrhardt has concluded that "[a]pparently expert testimony in administrative hearings must comply with sections 90.702 to 90.706, although the language of sections 120.569 and 120.57 does not clearly indicate this result."[33]

Daubert Is Applied in DOAH Proceedings More Often than It Is Not

A review of DOAH cases shows that most ALJs routinely apply *Daubert* or the requirements of section 90.702 to expert witness testimony:[34]

- In *Department of Financial Services v. M.C. Jennings, Jr. Construction Corp.*, the ALJ noted in a workers' compensation case that DFS had filed a *Daubert* motion prior to the final hearing and conducted voir dire of an expert witness. The ALJ concluded that the witness was not qualified as an expert.[35]
- In *Agency for Health Care Administration v. 1351 Golden, LLC, d/b/a Cross Terrace Rehabilitation Center*, the ALJ concluded that the testimony of two registered nurses met the requirements of section 90.702 and *Daubert* because they were testifying based on their personal observations and their testimony was reliable based upon principles and methods used by nurses and surveyors from AHCA in examining skilled nursing facilities in Florida.[36]
- In *Department of Health v. Moye*, the ALJ discussed the Legislature's replacement of the *Frye* standard with the *Daubert* standard. The ALJ did not address whether the Florida Supreme Court's actions/inactions with regard to *Daubert*'s potential application as a procedural matter in Florida courts had any applicability at DOAH. Instead the ALJ noted that the witness's years of experience in a field would have been a suitable basis to qualify the witness as an expert on the standard of care in a particular field. Unfortunately, the witness had been testifying on issues immaterial to his experience in the field of dentistry, and thus, his testimony was not given much weight.[37]
- In *Logisticare Solution, LLC v. Commission for the Transportation Disadvantaged*, the ALJ concluded without explanation that based upon *Daubert* and other cases, witness testimony about a topic that was not a recognized field of expertise was excluded.[38]
- In *Miami-Dade County School Board v. Gomez*, the ALJ assigned no weight to a witness's testimony because the witness was not qualified as an expert under section 90.702.[39]
- In *Dump the Pumps, Inc. v. Florida Keys Aqueduct Authority*, the ALJ noted that the parties moved to exclude the witnesses' testimony under section 90.702 and admitted the testimony without further elaboration.[40]
- In *Department of Professional Regulation v. Willner*, the ALJ noted that the parties disputed whether *Frye* or *Daubert* controlled the admissibility of expert testimony. The ALJ wrote that he had

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carefully considered *Daubert* when preparing his order.[41]

Raising a *Daubert* Objection in an Administrative Proceeding

As a final note, administrative practitioners should ensure they do not waive the opportunity to raise a timely *Daubert* objection. During the time *Daubert* was applicable in judicial proceedings, courts required the timely filing of a *Daubert* objection or request of a *Daubert* hearing.[42] Administrative proceedings, of course, frequently operate differently than Florida's trial courts. Because an administrative proceeding lacks a jury, the ALJ may defer ruling on a *Daubert* motion until after all the evidence has been received during the final hearing.[43]

Thus, to ensure the preservation of any *Daubert* objections, practitioners should ensure they highlight any potential *Daubert* issues in the pretrial stipulation and file a timely *Daubert* motion, perhaps asking the ALJ in advance his or her preference as to when and how those issues should be raised.[44]

Conclusion

As discussed above, many of DOAH's ALJs appear inclined to consider *Daubert* objections when ruling on the reliability of expert witness testimony. At the very least, administrative practitioners should be aware that the First District appears to be the only district court to have directly passed upon whether *Daubert* applies in administrative proceedings under chapter 120.[45] As the Florida Supreme Court's recent decision in *DeLisle* did not render *Daubert* unconstitutional in administrative proceedings, administrative practitioners should continue to be prepared to either raise or defend against *Daubert* objections.

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Endnotes

1 258 So. 3d 1219 (Fla. 2018).

2 *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

3 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

4 *Frye*, 293 F. at 1014.

5 *Brim v. State*, 695 So. 2d 268, 271-72 (Fla. 1997).

6 § 90.702, Fla. Stat. (as amended by ch. 2013-107, § 1, Laws of Fla.). The Legislature also amended portions of section 90.704, Florida Statutes, with regard to inadmissible facts or data upon which an expert relies to form his or her opinion.

7 *See, e.g.*, *DeLisle v. A.W. Chesterton Co.*, No. 12-25722 (27), 2013 WL 12200587 (Fla. Cir. Ct. Nov. 21, 2013), r*eversed by Crane Co. v. DeLisle*, 206 So. 3d 94 (Fla. 4th DCA 2016), *quashed by DeLisle v. Crane*, 258 So. 3d 1219 (Fla. 2018).

8 *In re: Amendments to Fla. Evid. Code*, 210 So. 3d 1231, 1241 (Fla. 2017).

9 *DeLisl*e, 258 So. 3d at 1223.

10 *Id.* at 1226.

11 *Jackson v. Dep't of Corr.*, 790 So. 2d 381, 384 (Fla. 2000).

12 258 So. 3d at 1227 (citing article V, section 2(a), Fla. Const. ("The supreme court shall adopt rules for the practice and procedure in all courts . . . .")); *see also In re Fla. Evid. Code*, 372 So. 2d 1369, 1369 (Fla. 1979), *clarified by* 376 So. 2d 1161 (1979).

13 "Rules of evidence may in some instances be substantive law and, therefore, the sole responsibility of the legislature. In other instances, evidentiary rules may be procedural and the responsibility of this Court." *In re Fla. Evid. Code*, 372 So. 2d 1369, 1369 (Fla. 1979), *clarified by* 376 So. 2d 1161 (1979). Most often, the Supreme Court has adopted the Florida Evidence Code to the extent that it is procedural. *DeLisle*, 258 So. 3d at 1222-25. But the Supreme Court has previously refused to adopt provisions of the Evidence Code it deemed procedural. *See, e.g.*, *In re Amends. to the Fla. Evid. Code*, 144 So. 3d 536, 536-37 (Fla. 2014) (declining to adopt section 90.5021, Florida Statutes, which establishes a "fiduciary lawyer-client privilege," and section 766.102(12), Florida Statutes, which involves a medical malpractice expert witness provision); *In re Amends. to the Fla. Evid. Code*, 782 So. 2d 339, 340-42 (Fla. 2004) (declining to adopt section 90.803(22), which permitted the admission of prior witness testimony, even if the declarant was available).

14 *State v. J.A., Jr.*, 367 So. 2d 702, 703 (Fla. 2d DCA 1979) (citing *State v. Garcia*, 229 So. 2d 236 (Fla. 1969)).

15 *DeLisle*, 258 So. 3d at 1229.

16 *Id.*

17 *Id.* at 1223, 1228-29.

18 *See id.* at 1229. Of course, "[r]ules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature." Art. V, § 2(a), Fla. Const.

19 *See id.* (citing *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732–33 (Fla. 1991) ("Where this Court promulgates rules relating to the practice and procedure of all courts and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict.").

20 *See SDI Quarry v. Gateway Estates Park Condo. Ass'n*, 294 So. 3d 1287, 1293 (Fla. 1st DCA 2018) (stating that administrative proceedings under chapter 120 are not governed by rules of procedure promulgated by the Florida Supreme Court, and holding that *Daubert* would have applied in the underlying proceeding had the issue been preserved for review).

21 *See Dep't of Prof'l Regulation v. Fla. Dental Hygienist Ass'n*, 612 So. 2d 646, 651 (Fla. 1st DCA 1993).

22 *SDI Quarry*, 294 So. 3d at 1293.

23 *See id.*

24 *See id.* at 1290-91.

25 *See id.* at 1293. Although SDI Quarry attacked the witness's training and experience during the administrative proceeding, the ALJ did not abuse his discretion to find the witness qualified to testify based on the record evidence.

26 209 So. 3d 1142 (Fla. 2017).

27 *Id.* at 1144.

28 *Id.* at 1144-46.

29 *Id.* at 1144.

30 *Id.* at 1145.

31 Bruce Culpepper, *The Use of the Florida Evidence Code in Administrative Hearings in Light of Florida Industrial Power Users Group v. Graham*, Vol XXXIX, The Florida Bar Administrative Law Section Newsletter, No. 3, at 23 (Mar. 2018).

32 *Id.* ("The provisions of the Florida Evidence Code may be used to help determine the reliability of documents or testimony that

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is introduced into the record.").

33 Charles W. Ehrhardt, 1 *Fla. Prac., Evidence* § 103.2 (May 2018 update) ("Presumably, the newly adopted *Daubert* standard is applicable in administrative proceedings."); *cf. U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 107-08 (Fla. 2002) (stating that workers' compensation proceedings in Florida "are subject to the rules of evidence" and that expert opinion is inadmissible unless it meets the former *Frye* test, because "dependability of result is required for the adjudication of workers' compensation claims no less than in generic civil and criminal litigation").

34 *But see In The Collection, LLC v. Jaguar Land Rover N. Am., LLC*, Case Nos. 13-0338, 13-4967, 14-0157, at 28-29 (Fla. DOAH May 22, 2015) (concluding that *Daubert* and section 90.702 did not apply to chapter 120 proceedings because (1) section 120.569(2)(g) is a specific provision and would have no meaning if it did not override the evidentiary provisions section 90.702; and (2) "there is some doubt whether the requirements of section 90.702 should even apply in a nonjury trial"); *see also* Edwin A. Bayo & John J. Rimes, *The Florida Bar, Prof'l and Occupational Licensing* § 6.3.I. (11th ed. 2017) ("[It appears that some ALJs are applying the *Daubert* test in DOAH proceedings but some are not . . . ."). *In The Collection* appears to be the minority view.

35 Case No. 16-0710, at 3 (Fla. DOAH June 27, 2016).

36 Case No. 15-1098, at 15 (Fla. DOAH Dec. 4, 2015).

37 Case No. 18-0659, at 7-8 (Fla. DOAH June 14, 2018).

38 Case No. 06-2393 at 5 (Fla. DOAH Sept. 29, 2006).

39 Case No. 14-3005, at 28-29 (Fla. DOAH Oct. 30, 2015).

40 Case Nos. 14-2415, 14-2416, 14-2417, 14-2420, at 3, 78 (Fla. DOAH Feb. 3, 2015).

41 Case No. 91-6795, at 2 (Fla. DOAH Sept. 20, 1993).

42 *See, e.g.*, *SDI Quarry*, 294 So. 3d at 1293; *State Farm Mut. Auto. Ins. Co. v. Long*, 189 So. 3d 335, 337 n.3 (Fla. 5th DCA 2016); *Rojas v. Rodriguez*, 185 So. 3d 710, 711 (Fla. 3d DCA 2016).

43 *See, e.g.*, *United Faculty of Fla. v. Fla. State Univ. Bd. of Trs.*, No. AF-2005-002, 2005 WL 6712036 (Fla. Pub. Emps. Relations Comm'n Nov. 30, 2005) (Final Order) (noting that the hearing officer deferred ruling on whether to qualify the witness as an expert until the recommended order); *see also* Russell Kent, *Changing Times: Evidentiary Issues in Administrative Proceedings,* at 3.7 (Apr. 10, 2014) ("Be sure and ask the Administrative Law Judge if she prefers you to raise [*Daubert*] issues by pretrial motion or in the proposed recommended final order.").

44 *See Dirling v. Sarasota Cty. Gov't*, 871 So. 2d 303, 306 (Fla. 1st DCA 2004).

45 *See State v. Barnum*, 921 So. 2d 513, 523 (Fla. 2005) ("[I]n the absence of interdistrict conflict, decisions of the district courts represent the law of the state, binding all Florida trial courts.").

Administrative Law Section

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