The Florida Bar Continuing Legal Education Committee and the Administrative Law Section present

2017 Administrative Law Update: DOAH, Discovery and Dogs!

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Friday, November 3, 2017
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32301

Course No. 2730R
Are you getting the most from your Member Benefits?

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Visit www.floridabar.org/memberbenefits for a complete list of member benefits
Common Questions About CLER

1. **What is CLER?**
   CLER, or Continuing Legal Education Requirement, was adopted by the Supreme Court of Florida in 1988 and requires all members of The Florida Bar to continue their legal education.

2. **What is the requirement?**
   Over a 3 year period, each member must complete 33 hours, 5 of which are in the area of ethics, professionalism, substance abuse, or mental illness awareness, and 3 hours in technology.

3. **Where may I find information on CLER?**
   Rule 6-10 of the Rules Regulating The Florida Bar sets out the requirement. All the rules may be found at [www.floridabar.org/rules](http://www.floridabar.org/rules).

4. **Who administers the CLER program?**
   Day-to-day administration is the responsibility of the Legal Specialization and Education Department of The Florida Bar. The program is directly supervised by the Board of Legal Specialization and Education (BLSE) and all policy decisions must ultimately be approved by the Board of Governors.

5. **How often and by when do I need to report compliance?**
   Members are required to report CLE hours earned every three years. Each member is assigned a three year reporting cycle. You may find your reporting date by logging in to your member portal at [member.floridabar.org](http://member.floridabar.org).

6. **Will I receive notice advising me that my reporting period is upcoming?**
   Four months prior to the end of your reporting cycle, you will receive a CLER Reporting Affidavit, if you still lack hours.

7. **What happens if I am late or do not complete the required hours?**
   You run the risk of being deemed a delinquent member which prohibits you from engaging in the practice of Florida law.

8. **Will I receive any other information about my reporting cycle?**
   Yes, you will receive reminders prior to the end of your reporting cycle, if you have not yet completed your hours.

9. **Are there any exemptions from CLER?**
   Rule 6-10.3(c) lists all valid exemptions. They are:
   1) Active military service
   2) Undue hardship (upon approval by the BLSE)
   3) Nonresident membership (see rule for details)
   4) Full-time federal judiciary
   5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
   6) Inactive members of The Florida Bar
10. **Other than attending approved CLE courses, how may I earn credit hours?**
   Credit may be earned by:
   1) Lecturing at an approved CLE program
   2) Serving as a workshop leader or panel member
   3) Writing and publishing in a professional publication or journal
   4) Teaching (graduate law or law school courses)
   5) University attendance (graduate law or law school courses)

11. **How do I submit various activities for credit evaluation?**
   Applications for credit may be found on our website, www.floridabar.org.

12. **How are attendance hours posted on my CLER record?**
   You must post your credits online by logging in to your member portal at member.floridabar.org.

13. **How long does it take for hours to be posted to my CLER record?**
   When you post your CLE credit online, your record will be automatically updated and you will be able to see your current CLE hours and reporting period.

14. **How may I find information on programs sponsored by The Florida Bar?**
   You may wish to visit our website, www.floridabar.org/cle, or refer to The Florida Bar News. You may also call CLE Registrations at 850/561-5831.

15. **If I accumulate more than 30 hours, may I use the excess for my next reporting cycle?**
   Excess hours may not be carried forward. The standing policies of the BLSE, as approved by the Supreme Court of Florida specifically state in 6.03(b):
   ... CLER credit may not be counted for more than one reporting period and may not be carried forward to subsequent reporting periods.

16. **Will out-of-state CLE hours count toward CLER?**
   Courses approved by other state bars are generally acceptable for use toward satisfying CLER.

17. **If I have questions, whom do I call?**
   You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

   **While online checking your CLER, don’t forget to check your Basic Skills Course Requirement status.**
PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

CLE CREDIT
(Maximum 8.0 hours)

General ............................................. 8.0 hours  Ethics .............................................. 1.0 hour
Technology ....................................... 1.0 hour

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date you will be sent a Reporting Affidavit (must be returned by your CLER reporting date). You are encouraged to maintain records of your CLE hours.

CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.

CLE COMMITTEE MISSION STATEMENT

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

COURSE CLASSIFICATION

The Steering Committee for this course has determined its content to be ???.

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ADMINISTRATIVE LAW SECTION

Robert Hosay — Chair
Garnett Chisenhall — Chair-elect

CLE COMMITTEE

Jenifer S. McCaffrey Lehner, Tampa — Chair
Terry L. Hill — Director, Programs Division

For a complete list of Member Services visit our web site at www.floridabar.org.
LECTURE PROGRAM

8:00  Registration

8:30  Mock hearing followed by Q & A
      *ALJ Nelson
      *ALJ Chisenhall
      Vinette Godelia
      Rachelle Munson
      Libby Pedersen

11:00  Break

11:15  E-Discovery and Evidence Spoliation
       Stephanie Daniel

12:05  Lunch

1:30  Overview of Administrative Law Section website
      *ALJ Chisenhall

1:40  Evidence Issues in Administrative Proceedings
      *Marc Ito

2:30  Break

2:40  Hearing Practice in Administrative Proceedings
      *Tara Price
      Tabitha Harnage
      Fred Aschauer

4:00  Panel Discussion of Judges
      *ALJ Yolonda Green
      *ALJ Dave Watkins
      *ALJ Jessica Varn
      Thomas “Bo” Winokur

5:00  End
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AUTHORS/LECTURERS

FRED ASCHAUER represents clients on matters related to litigation and environmental regulation. He previously served as General Counsel for the Florida Department of Environmental Protection (FDEP), and prior to that as FDEP’s Director of the Division of Water Resource Management. He has been involved in multiple cases before the Division of Administrative Hearings involving environmental resource permits, consumptive use permits, and water quality standards. His practice also involves Federal matters governed by the Clean Water Act “CWA,” National Environmental Policy Act “NEPA,” and the Freedom of Information Act “FOIA.” He has published articles and presented on topics such as water quality credit trading, litigation under the Federal Administrative Procedure Act, numeric nutrient criteria, and regulatory issues. Fred served in the United States Army from 1993-1997. He graduated Cum Laude from the Florida State University College of Law in 2003.

GAR CHISENHALL began his legal career in 2000 as a staff attorney at the First District Court of Appeal. In 2002, he began working for the Agency for Health Care Administration and split his time between appeals and DOAH hearings. Gar was promoted to AHCA’s Chief Appellate Counsel in 2005 and held that position before leaving in 2007 to join the Administrative Law Section of the Attorney General’s Office. Between December of 2008 and July of 2015, Gar was the Chief Appellate Counsel for the Department of Business and Professional Regulation, Florida’s largest regulatory agency. During his stint at the Department, he became Board Certified in Appellate Practice. Since August of 2015, Gar has been an Administrative Law Judge.

STEPHANIE A. DANIEL – Ms. Daniel is the Chief of the General Civil State Programs Bureau in the Office of the Attorney General, where she has been employed since 1991. Her practice consists of representing state agencies and employees in state and federal court in complex litigation, including class action defense. She is board certified in State and Federal Government and Administrative Practice and is AV rated by Martindale Hubbell. While at the Office of the Attorney General, she has provided representation in administrative proceedings that overlap with other civil litigation, including rule challenges, proposed rule challenges, and challenges to non-rule policy. Previously, she also handled many license disciplinary proceedings against physicians, osteopathic physicians, nurses, naturopaths, contractors, electrical contractors, and massage therapists. She is a graduate from the Florida State College of Law.

VINETTE GODELIA practice focuses on the negotiation of approvals under the state’s growth management laws and local government land development regulations. She represents clients before state, regional and local government bodies on an array of land use and real estate development issues in order to secure entitlements to allow the development of projects. Vinette also represents clients in formal hearings before the Division of Administrative Hearings and circuit and appellate courts. Successful negotiation of land use approvals often requires coordination of a team of expert planning and environmental consultants. Vinette has participated in and lead such team efforts and, in doing so, worked with consultants across the state. Before becoming a lawyer, Vinette worked with Visit Florida, the state’s official tourism organization in various capacities including public relations and destination sales. She completed her career with Visit Florida as head of the Mid-Atlantic office in Washington, D.C. Vinette was born and raised in Jamaica, moving to the United States permanently at age 15.
TABITHA HARNAGE is a Senior Attorney with the Department of Financial Services, where she represents the Department in workers' compensation compliance, medical services, rule challenge, and Special Disability Trust Fund cases. Tabitha graduated from Faulkner University's Thomas Goode Jones School of Law in Montgomery, Alabama after completing her undergraduate degree at Florida Atlantic University in Boca Raton. While in law school, Tabitha participated in the Mediation Clinic where she assisted low income clients resolve various legal issues outside of the courtroom. She was also a member of the Moot Court team and studied abroad through Gonzaga University Law's International Human Rights Program in Florence, Italy. She enjoys her involvement in the community with the First Baptist Church, Junior League of Tallahassee, and the Legal Aid Foundation. She also holds Board and Council positions with the Young Lawyers' Section of the Tallahassee Bar Association and the Administrative Law Section of the Florida Bar. You can reach Tabitha at Tabitha.Harnage@myfloridacfo.com.

MARC ITO - Marc is an attorney with Parker, Hudson, Rainer and Dobbs. He is in the Firm's Health Industry Practice Group in the Tallahassee office. His practice is concentrated on Florida's Administrative Procedure Act, with a focus on health care litigation and regulatory compliance. Before going in to private practice, Marc spent seven years representing various agencies of the State of Florida. During this time he represented the State in rulemaking and rule challenges under Florida's Administrative Procedure Act, federal class actions related to Medicaid, and Medicaid Qui Tam actions under Florida's False Claims Act.

RACHELLE MUNSON currently serves as an Assistant Attorney General in the Tallahassee Administrative Law Bureau of the Office of the Attorney General representing various statewide administrative boards. She has enjoyed a 27-year career in public service. Ms. Munson previously worked as a Senior Attorney practicing administrative law with the Department of Economic Opportunity/ Reemployment Assistance Appeals Commission, Office Administrator for the Agency for Workforce Innovation and as an Administrative Hearing Officer with the formerly named Department of Labor and Employment Security. Ms. Munson has distinguished herself through her legal leadership positions. She is a past president of the Virgil Hawkins Florida Chapter National Bar Association and Paul C. Perkins Bar Association, former member of the Florida Supreme Court Standing Committee on Fairness and Diversity and a current board member of Florida Rural Services, Inc. In addition to former and current service to various voluntary bar organizations and Florida Bar committees, Ms. Munson is a current member of the Administrative Law Section and Government Lawyer Section of The Florida Bar. She graduated from the University of Florida College of Liberal of Arts and Sciences and the College of Law.

LISA “LI” SHEARER NELSON earned a B.A. with Honors in English from Carson-Newman College in 1980 and a J.D. with honors from Florida State University in 1983, where she was a Notes and Articles Editor for the FSU Law Review. From 1983-1986, she was a law clerk to Chief Justices James Alderman and Joseph Boyd of the Florida Supreme Court. From 1986-1999, Judge Nelson was chief appellate counsel for the Department of Professional Regulation and deputy general counsel for the Department of Business and Professional Regulation (DBPR). During her service as appellate counsel, Judge Nelson argued cases in all five Florida District Courts of Appeal, the Florida Supreme Court, the Eleventh Circuit Court of Appeals, and the United States Supreme Court. She entered private practice in 1999 as Director of the Tallahassee office of the Holtzman Equels law firm (then known as Holtzman, Krinzman, Equels & Furia), and worked in that capacity until she became an administrative law judge at DOAH in June 2006. Judge Nelson is a member of the Administrative Law and Health Sections of The Florida Bar, and was on the Executive Counsel of the Administrative Law Section from 1997 to 2013.
serving as Chair for the 2002-03 term. She currently serves as the Deputy Chief Judge for the Division of Administrative Hearings.

**ELIZABETH L. PEDERSEN** practices civil, administrative, and regulatory litigation with an emphasis on hospital, hospice, and nursing home development (Certificate of Need), Change of Ownership (CHOW), and trauma center litigation proceedings before the Agency for Health Care Administration. She also practices in the areas of healthcare licensure, commercial litigation, insurance defense matters, and representation of educational and health care institutions. Ms. Pedersen graduated from the University of Miami School of Law in 2003. Ms. Pedersen earned a Bachelor of Arts and Sciences in History from Tulane University in 2000. Ms. Pedersen is a member of the Administrative Law, Health Law, and General Practice Solo and Small Firm Sections of the Florida Bar, and is a member of the American Health Lawyers Association (AHLA), and is admitted to practice in the U.S. District Court for the Northern, Middle, and Southern Districts of Florida. Ms. Pedersen is a member of Leadership Broward Class XXXVI and serves as an advisor to the Upsilon Delta Chapter of Chi Omega at the University of Miami. She is active in the Tulane University Alumni Association and an avid University of Miami football fan.

**TARA R. PRICE** is a Tallahassee litigation attorney that focuses her practice in the areas of administrative, commercial, fiduciary and appellate litigation. Prior to joining Holland & Knight, Ms. Price was a judicial law clerk for the Honorable Adalberto Jordan of the U.S. Court of Appeals for the Eleventh Circuit and the Honorable Robert L. Hinkle of the U.S. District Court for the Northern District of Florida. During law school, Ms. Price interned for the Honorable Charles T. Canady of the Florida Supreme Court. She was one of 13 students from more than 150 statewide applicants selected to serve as a gubernatorial fellow in 2010 and 2011 for Governors Charlie Crist and Rick Scott. Before attending law school, Ms. Price worked for more than eight years as a communications professional in Florida, including service in the state executive and legislative branches, as well as on one presidential and two statewide campaigns. From 2006 to 2009, she worked as the communications director for Florida Chief Financial Officer Alex Sink. Ms. Price also worked as a communications professional in the Florida House of Representatives during four regular and numerous special sessions, where she analyzed legislation and assisted dozens of state legislators with media relations and constituent outreach.

**THOMAS “BO” WINOKUR** was appointed to the First District Court of Appeal by Governor Rick Scott on June 11, 2015 and took office July 6, 2015. Before his appointment Judge Winokur had served as Assistant General Counsel for the Executive Office of the Governor since 2011. He previously served as Assistant Attorney General for the Florida Office of Attorney General, practicing in criminal appeals and capital litigation. Judge Winokur began his career in private practice in Live Oak, but later served in the United States Army Judge Advocate General’s Corps from 1992 to 1995. Judge Winokur received his bachelor’s and law degrees from the University of Florida.
Mock Hearing followed by Q &A

Panel

ALJ Nelson
ALJ Chisenhall
Vinette Godelia
Rachelle Munson
Libby Pedersen
DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF PARI-MUTUEL WAGERING,

Petitioner, DBPR Case No. 2016-012345

v.

MERRY WHINE COOLER,

Respondent.

____________________________________/

ADMINISTRATIVE COMPLAINT

The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Petitioner"), files this Administrative Complaint against Merry Whine Cooler, ("Respondent"), and alleges as follows:

1. The Petitioner is the state agency charged with regulating pari-mutuel wagering pursuant to chapter 550, Florida Statutes.

2. Saddle Ups Racing Arena is a facility operated by a permitholder authorized to conduct pari-mutuel wagering in this state under chapter 550, Florida Statutes.

3. At all times material hereto, Respondent held a pari-mutuel wagering professional individual occupational license, number 246875-1234, issued by the Division.
4. Pursuant to section 550.2415(1)(a), Florida Statutes (2017), “the racing of an animal that has been impermissibly medicated or determined to have a prohibited substance present is prohibited. It is a violation of this section for a person to impermissibly medicate an animal or for an animal to have a prohibited substance present resulting in a positive test for such medications or substances based on samples taken from the animal before or immediately after the racing of that animal.”

5. Section 550.2415(1)(c), Florida Statutes (2017), states, “[t]he finding of a prohibited substance in a race-day specimen constitutes prima facie evidence that the substance was administered and was carried in the body of the animal while participating in the race.”

6. Florida Administrative Code Rule 61D-6.002(1) provides, “[t]he trainer of record shall be responsible for and be the absolute insurer of the condition of the horses... he/she enters to race.”

Facts Specific to Sample No. 001002

7. At all times material hereto, Respondent was the trainer of record for the horse “SLOW TO RISE,” tattoo number 42N82BHR.

8. On or about September 4, 2016, “SLOW TO RISE” finished in second place in the seventh race at Saddle Ups Racing Arena.
9. On or about September 4, 2016, a Division employee collected urine sample 001002 from “SLOW TO RISE.”

10. Sample number 001002 was processed in accordance with established procedures and forwarded to the University of Florida Racing Laboratory (“the lab”) for analysis.

11. The lab tested sample number 001002 and found that it contained caffeine, a central nervous system stimulant and a class 2 drug under the Uniform Classification Guidelines for Foreign Substances, as promulgated by the Association of Racing Commissioners, Inc. The concentration of caffeine in the sample was 4.623 +/- 0.03 mcg/mL.

**Facts Specific to Sample 001006**

12. At all times material hereto, Respondent was the trainer of record for the horse “QUICK TO FALL,” tattoo number 2L84U2C.

13. On or about September 4, 2016, “QUICK TO FALL” finished in first place in the fifth race at Saddle Ups Racing Arena.

14. On or about September 4, 2016, a Division employee collected urine sample 001006 from “QUICK TO FALL.”

15. Sample number 001006 was processed in accordance with established procedures and forwarded to the University of Florida Racing Laboratory (“the lab”) for analysis.
16. The lab tested sample number 001006 and found that it contained caffeine, a central nervous system stimulant and a class 2 drug under the Uniform Classification Guidelines for Foreign Substances, as promulgated by the Association of Racing Commissioners, Inc. The concentration of caffeine in the sample was 3.823 +/- 0.03 mcg/mL.

17. Sample number 001006 also contained theobromine, a diuretic/smooth muscle relaxant and a class 4 drug under the Uniform Classification Guidelines for Foreign Substances, as promulgated by the Association of Racing Commissioners, Inc. The concentration of theobromine in sample 001006 was 1.893 +/- 0.09 mcg/ml.

**COUNT I**

18. Petitioner realleges and incorporates paragraphs one through eleven as though fully set forth herein.

19. Based on the positive test for caffeine described above, Respondent violated section 550.2415(1)(a), Florida Statutes (2017), by racing “SLOW TO RISE,” a horse that was impermissibly medicated or that was determined to have a prohibited substance present resulting in a positive test for caffeine based on samples taken from “SLOW TO RISE” before or immediately after the racing of “SLOW TO RISE” on or about September 4, 2016.
COUNT II

20. Petitioner realleges and incorporates paragraphs one through six and twelve through sixteen as though fully set forth herein.

21. Based on the positive test for caffeine described above, Respondent violated section 550.2415(1)(a), Florida Statutes (2017), by racing “QUICK TO FALL,” a horse that was impermissibly medicated or that was determined to have a prohibited substance present resulting in a positive test for caffeine based on samples taken from “QUICK TO FALL” before or immediately after the racing of “QUICK TO FALL” on or about September 4, 2016.

COUNT III

22. Petitioner realleges and incorporates paragraphs one through six, twelve through fifteen, and seventeen as though fully set forth herein.

23. Based on the positive test for theobromine described above, Respondent violated section 550.2415(1)(a), Florida Statutes (2017), by racing “QUICK TO FALL,” a horse that was impermissibly medicated or that was determined to have a prohibited substance present resulting in a positive test for theobromine based on samples taken from “QUICK TO FALL” before or immediately after the racing of “QUICK TO FALL” on or about September 4, 2016.
WHEREFORE, Petitioner respectfully requests the Division enter an Order imposing against Respondent one or more of the penalties specified in Florida Administrative Code Rule 61D-6.012, section 550.2415(3)(a), Florida Statutes, and/or any other relief that the Division is authorized to impose pursuant to chapter 550, Florida Statutes, and/or the rules promulgated thereunder.

Signed this 1st day of April, 2017.

THADDEUS MEE, Secretariat/ Secretary
Department of Business and Professional Regulation

/s/

Sea Biscuit
Florida Bar No. 0000
Assistant General Counsel
Chief Attorney
Division of Pari-Mutuel Wagering
Department of Business and Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399
T: (850) 111-2222
F: (850) 111-2223
NOTICE OF RIGHTS

Please be advised that within twenty-one (21) days of your receipt of this administrative complaint you have the right to request an administrative hearing. Any such hearing would be conducted in accordance with the provisions of sections 120.569 and 120.57, Florida Statutes, and you would have the right to be represented by counsel or other qualified representative, to call and examine witnesses, and to have subpoenas issued on your behalf. However, if you do not file (i.e., we do not receive) your request for hearing within the twenty-one (21) days, you will have waived your right to a hearing.

Please also be advised that mediation is not available in this matter.

NOTICE OF RIGHT TO REQUEST A SPLIT SAMPLE

With respect to each “Report of Positive Result” from the University of Florida Racing Laboratory (UF Racing Laboratory) here supplied you, please be advised that you have a right to request a split sample pursuant to Rule 61D-6.006, Florida Administrative Code, by submitting Form DBPR PMW-3290, Notification to Stewards/Judge of Split Sample Request.

You can obtain Form DBPR PMW-3290, Notification of Steward/ Judge of Split Sample Request, as well as a list of approved split sample laboratories, at the State Office located in any Florida pari-mutuel facility or on the Division of Pari-Mutuel Wagering’s website: www.myfloridalicense.com/dbpr/pmw/forms.html. You must submit your Form DBPR PMW-3290 split-ample request to the Division’s steward or judge within no more than ten (10) days from your receipt of this notice, or you will waive your right to a split sample.

/s/ Harold “Hoss” Whisperer
DBPR PMW Chief of Operations
STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF PARI-MUTUEL WAGERING

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF PARI-MUTUEL WAGERING,

Petitioner,

DBPR Case No. 2016-012345

v.

MERRY WHINE COOLER,

Respondent.

________________________________/

REQUEST FOR HEARING, ANSWER, AND AFFIRMATIVE DEFENSES

Respondent, MERRY WHINE COOLER, pursuant to Florida
Administrative Code 28-106.201, 28-106.203, the Rules of Civil
Procedure, and all other applicable law, hereby requests a
formal administrative hearing and responds to the
correspondingly numbered paragraphs of Petitioner’s
Administrative Complaint as follows:

1. Respondent admits the allegations contained in
paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 12, 13, XXXX.

2. Respondent is without knowledge as to the allegations
contained in paragraphs 9, 10, 11, 14, 15, 16, and 17 and
therefor denies them.

3. Respondent denies the allegations contained in
paragraphs 18, 19, 20, 21, 22, and 23.
AFFIRMATIVE DEFENSES

4. For her First Affirmative Defense, Respondent states that Petitioner has failed to link any of its material allegations of fact to Respondent, and therefore has failed to state a cause of action against Respondent. Petitioner failed to follow its own rules and procedures under Florida Administrative Code Rule 61D-6.005, therefore, Petitioner cannot prove any of the facts of its case.

5. Section 440.2415, Fla. Stat., gives the authority to the Respondent to test racing animals for both illegal substances and abnormal concentrations of legal substances in the blood and urine of the subject animal. Petitioner’s Complaint alleges that Respondent has violated Section 550.2415(1)(c), Fla. Stat., in that the urine of a horse for which Respondent was the responsible trainer-of-record was allegedly tested for substances on September 4, 2016, right before it raced.

6. Section 550.2415, Fla. Stat., provides the Respondent with authority to adopt rules to implement this section, and the Respondent has done so. Florida Administrative Code 61D-6.005 sets forth the rules regulating the testing of racing animals. Some of the procedures that must be followed are as follows:

"Any racing animal the judges, division or track veterinarian of the meet designate, shall be sent immediately prior to the race to the detention..."
enclosure for examination by the authorized representative of the division for the taking of urine or other such samples as shall be directed for the monitoring and detection of both permissible and impermissible substances.” FAC 61D-6.005(2)

“The owner, trainer of record, or other authorized person is permitted to witness when urine, or other specimens are taken from their racing animal. Each specimen shall be collected. Each specimen shall be collected in a closed blood tube or urine container, assigned a sample number which is affixed to the specimen container, and the correspondingly numbered information portion of the sample tag shall be detached and may be signed by the owner, trainer, groom, or the authorized person if they choose to do so. The specimen shall be sealed in its container, assigned an official sample number ... and the correspondingly numbered information portion of the sample tag shall be detached and signed by the owner, trainer, groom, or the authorized person as a witness to the taking and the sealing of the specimen.” FAC 61D-6.005(4)

7. In particular, but without limitation, in the instant case, the Petitioner’s Administrative Complaint states that the alleged samples were taken “on or about” the date of each race, and fails to state with particularity the time each sample was taken. This is important because it could be in violation of Section 550.2415, Fla. Stat., and Rule 61D-6.005(4), which together require the samples to be taken immediately prior to each race.

8. Additionally, FAC 61D-6.005(4) is clear that the owner, trainer, or authorized representative must be notified that his/her animal will be tested so that he/she has the opportunity to witness the testing and sign the sample tag.
Petitioner failed to advise the trainer, owner, or authorized representative of the alleged testing of the subject greyhounds, therefore they have failed to follow their own rules and in doing so they have failed to state a cause of action.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via email to Mr./Ms. Sea Biscuit, Deputy Chief Attorney, Division of Pari-Mutuel Wagering, 2601 Blair Stone Road, Tallahassee, Florida 32399, this 20th day of April 2017.

_________________________________
Pro Se Respondent
MERRY WHINE COOLER
456 Bartles & James Drive
Saddle Up, Florida 98765
E-Discovery and Evidence Spoliation

By

Stephanie Daniel
Ediscovery & Sanctions

I. Terms & Glossary
   a. ESI = Electronically Stored Information. Includes but is not limited to email.
   b. EDRM – Electronic Discovery Reference Model© - This includes:
      1. Information governance
      2. Identification of potentially responsive data
      3. Preservation & collection of data
      4. Review, analysis & processing of data
      5. Production
      6. Presentation of Data.
   c. File type - references the file extension/document type. May include, but isn’t limited to Microsoft Word files or word processing files, email files, Excel or spreadsheet files, PowerPoint or presentation files, text files, and image files

II. Relevant Rules & Statutes
   a. Rules Regulating the Florida Bar:
      i. Rules Reg. Fla. Bar 4-1.1: A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
      ii. In the comments to the changes to Rule 4-1.1 that took effect on 1/1/2017, the following language appears:
          Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question. Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications.
          ***
          To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, including an understanding of the benefits and risks associated with the use of technology, and comply with all continuing legal education requirements to which the lawyer is subject.
      iii. Bar now requires that attorneys obtain 3 hours in approved technology programs, for a total of 33 hours for each reporting cycle. Rule 6-10.3(b), Rules Reg. Fla Bar.
   b. Rule 28-106.206, F.A.C., provides that parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Fla. R. Civ. P.
   c. Florida Rules of Civil Procedure
      i. Rule 1.280(b)(3), Fla. R. Civ. P. - A party may obtain discovery of ESI in accordance with the civil rules.
      ii. Rule 1.280(d), Fla. R. Civ. P. – limitations on discovery of ESI:
1. Don’t have to produce ESI that is not reasonably accessible due to undue burden or cost. Also authorizes Court to order discovery of ESI in particular formats. Rule 1.280(d)(1), Fla. R. Civ. P
2. Court must limit frequency or extent of e-discovery if it determines:
   a. the discovery sought is unreasonably cumulative or duplicative, or can be obtained from another source or in another manner that is more convenient, less burdensome, or less expensive; or
   b. the burden or expense of the discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

iii. Rule 1.350(b), Fla. R. Civ. P.
1. provides that the request for production may specify the form or forms in which ESI is to be produced.
2. If the responding party objects to the requested form, it must state the form or forms it intends to use.
3. When producing ESI, the producing party shall either produce them as they are kept in the usual course of business or shall identify them to correspond with the categories in the request.
4. If a request does not specify the form for producing ESI, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. Rule 1.350(b), Fla. R. Civ. P.


v. Rule 1.340(c), Fla. R. Civ. P. – option to produce records includes the option to produce ESI.

vi. Rule 1.380, Fla. R. Civ. P. – Failure to Make Discovery, Sanctions - 1.380(e) – safe harbor rule (ESI lost as a result of the routine, good faith operation of an electronic information system)

III. Clawback Agreements

IV. Technology & Ediscovery
   a. A basic understanding of technology and ediscovery is critical – because you need to understand what the various tools on the market can and can’t do.
   b. You need to have a basic understanding of what is being done to protect data security, particularly to the extent that you are possessing, sending, or receiving confidential data.
   c. Technology can be your friend
      i. Most of the tools out there can help with one or more of the different stages in the Electronic Discovery Reference Model.
There are now a variety of relatively easy to use products that can be used at each stage of the process – but they can be costly.

d. Early client meeting to discuss:
   i. Search capability;
   ii. Where data is stored (data map); and
   iii. Who is likely to have data relevant to the case.

e. The decision about what software to use.
   i. First, has your law firm invested in software? More law firms are not doing this in house, because it’s hard to keep up with technology changes.
   ii. Gartner has information about reviews for different software providers. [https://www.gartner.com/reviews/market/e-discovery-software.](https://www.gartner.com/reviews/market/e-discovery-software.)
   iii. Gartner has its own assessment of where different products are ranked, in their “magic quadrant” – but this requires that you establish an account.
   iv. Use potential vendors to show you the software and how it works in a demonstration environment. This isn’t training, but it gives you an idea of what the software will do. If you’ve done this before with the same software – ask them to focus on what’s new. The software market continues to evolve.
   v. It is important to know what you need your software to do. If you have a very small amount of email or ESI to review or produce, you may not need all the bells and whistles.
   vi. Processing ESI
      1. Deduplication – good to have pre and post deduplication data about search results.
      2. How ESI is exported after collection for review (want to be sure that the export maintains custodian relationships)
   vii. Potential functionalities
      1. Software and hardware to perform searches to collect responsive data – server level or PC level
      2. Forensic searching
      3. Litigation hold software – helps with preservation obligations, and keeping track of potential legal evidence. Tracks communications to custodians of responsive information about their litigation hold responsibilities.
      4. Review tools – to help:
         a. Tag documents with preset tags
            i. Hot docs
            ii. Nonresponsive
            iii. Particular issues
            iv. Privilege tags
         b. Generate a privilege log.
      5. Analytics. May include:
         a. Ability to analyze who is emailing whom
b. On what dates most relevant email is sent or received.
c. Helps with grouping emails that may be part of a chain, to facilitate review of all related emails and attachments together, rather than at different times.
d. Identify “near duplicate” documents
e. Make sure you know whether Analytics are an add on to the base review tool

6. Processing software may require a different tool, depending on the software you utilize – formatting of documents

f. To use a vendor or not
   i. If properly vetted they can be a very helpful resource in learning about the technology related to your project, and they will be able to testify about any issues with the EDRM process.
   ii. Vendors can load your data faster than you probably can, and have it review ready in a shorter period of time.
   iii. Vendors are able to provide access to ediscovery products that you, as a law firm or state agency, might not be able to afford to have installed.
   iv. The prices for some vendors are coming down. Old pricing (per page) vs. current pricing (per gigabyte).
   v. You have a resource available to (1) train your staff on the use of the product, and (2) to help if you have problems.
   vi. There are different vendor models. Some vendors will make it possible for you to do as much or as little as you choose to do for set pricing schemes. But watch out for case management fees.

g. Options for ediscovery on a tight budget

h. Using ediscovery software to cull down data in large data sets.

i. Setting a budget for your ediscovery.
   i. Budget calculators - https://www.edrm.net/resources/budget-calculators/
   ii. Key facts
      1. Approximation of volume of data by file type that can be translated into estimated number of pages. To determine this, may use https://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf.
      2. Amount of time you have to complete the project
      3. Number of reviewers
   iii. This data may also be useful when quantifying the burden of responding to a request for ediscovery
   iv. Once you’ve set your budget, you want to monitor your spending frequently. This is an area where you an overspend quite quickly.

j. Search methodologies
   i. Important to know the search limitations for the software that will be used to collect data. Most use Boolean search engines. This doesn’t include the kinds of terms and connectors that you see with legal research tools.
Key word searches

1. Parties should collaborate and cooperate when choosing keywords for a discovery request search.
2. May test key words on a sample of documents.
3. Good idea to consult with the owners/custodians of the records to determine appropriate search terms.

Fuzzy searching – which looks for the particular term and for misspellings or variants of the term. Works best if the word is less common, particularly with misspellings.

Technology Assisted Review or Computer Assisted Review

1. Train the computer to seek relevant data.
2. Works best when there is a sufficient volume of responsive emails in the data.
3. Involves serial reviews of samples of the data, after which the computer attempts to locate the documents you have identified as being responsive, nonresponsive, etc. Then you review to confirm. This is done until the level of accuracy reaches a sufficient level.

Other analytics – date & custodian searching

Goal of any search methodology is two-fold: (1) to locate responsive documents; and (2) to get the responsive data down to a manageable amount for review and production purposes.

Most searching is not going to be a “one and done.” Need to search and sample search results for responsiveness and non-responsiveness. Need to look at the burden of collecting, processing, and reviewing documents returned with overly broad searches.

Quality Control

1. Need steps in place to ensure that, at each phase, you are properly identifying responsive and nonresponsive data.
2. At the review stage, typically involves sampling of work done by reviewers for accuracy, and depending on the results, following up reviews.

You need to document everything that is done in the e-discovery process, from start to finish.

Duty of Cooperation and Candor

1. The general rule in ediscovery is that you must cooperate with your opponent in the ediscovery process, and particularly in the collection process.
2. You have to be prepared to explain:
   i. What you used to collect data
   ii. Where you searched and why
   iii. What search methodology you used
   iv. Limitations that may exist on your capabilities, particularly when it comes to requests for production in particular formats, issues with collection, etc.
v. Have to discuss issues with loss of data, due to normal events or otherwise.
c. Can no longer treat production of documents like a one-sided search and production effort.

VI. Potential other resources for cases involving large ESI discovery
a. Request that the Court consider a case management conference early in the case, similar to what would be available in a civil action under Rule 1.200, Fla. R. Civ. P.
  i. Discuss
      1. The possibility of agreements regarding the extent to which ESI must be preserved, and any problems with preservation;
      2. The form in which ESI should be produced; and
      3. Whether ESI discovery should be conducted in phases or limited to particular individuals, time periods, or sources.
      4. Other ESI stipulations.
  ii. Address how to handle issues that arise with ESI - Some federal courts do not require a motion on discovery issues. They merely require a notice which describes the issue to be raised.
  iii. Early case management can make a big difference with ESI.

b. Might consider regular status conferences if an ESI discovery issue arises, so the court is aware of the steps being taken by the parties to address the issue, including:
  i. Efforts to negotiate a resolution of the ESI dispute,
  ii. Efforts to conduct sample searches to determine burden,
  iii. The progress of actual production, and
  iv. Any problems that may arise.

c. Rule 1.310(b)(6), Fla. R. Civ. P., deposition to determine where responsive ESI may reside, and general practices about data preservation and storage
d. Requesting data map

VII. Sanctions
a. Section 120.569(2)(f), Fla. Stat.:
   (f) The presiding officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure, including the imposition of sanctions, except contempt.

b. Rule 1.380, Fla. R. Civ. P.
   i. Attorney’s fees and costs associated with the motion
   ii. If you have a preexisting order compelling discovery that is violated, potential sanctions include:
      1. Determining certain facts are to be taken as established
      2. Prohibiting the introduction of matters in evidence
      3. Striking pleadings or parts of them
4. Staying proceedings until order is obeyed  
5. Dismissing action or entering a default against the disobedient party  

VIII. Resources  
   a. The Electronic Discovery Reference Model (EDRM)  
      [www.edrm.net](http://www.edrm.net)  
   b. Sedona Conference  
      [www.thesedonaconference.com](http://www.thesedonaconference.com)  
   c. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D. N.Y. 2003), and subsequent opinions relating to this case.
Terminology

- E-discovery is discovery of electronic information. It can most commonly include email, word processing documents, spreadsheets, presentations, images, text files, and specialized databases.
- E-discovery may be had from anywhere responsive data may be had. This includes smart phones, laptops, tablets, servers, PCs. It includes files which may be located on network servers, as well as files that may only reside on someone’s local computer. It can include deleted files and archived or back up media. It includes text messages, voice mail messages, and geolocation information.

Terminology

- E-discovery may be had from work-related data and from one’s personal devices and computers - if work related data is stored on those devices.
- ESI is electronically stored data. This includes the emails, word processing documents, spreadsheets, presentations, images, text files, specialized databases and other types of electronically stored information.
Terminology

- **File Type** - this refers to different file formats of ESI, that are usually identified by the file extension associated with a document - such as .docx, .doc, .wpd, .xls, .xlsx, .xml, .msg, .rtf, .txt, .pptx, or .ppt. See [https://fileinfo.com/filetypes/common](https://fileinfo.com/filetypes/common) for a list of common file types showing the file type associated with different file extensions.

- **Native files vs. rendered files (pdf)** - PDFs are documents “rendered” into an image for display. This process may eliminate certain metadata fields. A “native file” contains the metadata of the original document - so long as you have not deleted metadata.

- **Metadata** - literally data about data. Different file types have different metadata. An example would be an email. Typically, some of the metadata email includes: sender, recipient, ccs, bccs, subject, date, content, attachments. These are but some of the metadata fields in an email. In a Word document, metadata fields include, but are not limited to, the author, who last modified the document, the date the document was created, the date it was last modified, the date it was last printed, file size, and more.
Step 1 in E-discovery - Information Governance

- Information Governance Policies are very important. But complying with those policies is even more critical.
- A Zetabyte is 1,000,000,000,000,000,000,000 Bytes.

Step 1 in E-discovery - Information Governance

- The size of the digital universe will double every two years - at least. [https://insidebigdata.com/2017/02/16/the-exponential-growth-of-data/](https://insidebigdata.com/2017/02/16/the-exponential-growth-of-data/).
- Once a case is filed, it’s too late to be enforcing your retention policies.

Step 1 - Information Governance

- There may be circumstances where agencies may adopt their own retention schedules.
Step 2 & 3- Identification, Preservation & Collection

- As soon as litigation is “reasonably foreseeable,” you should begin the process of preserving data that may be relevant. League of Women Voters of Florida v. Detzer, 172 So.3d 363, 390 (Fla. 2015).
- Preservation requests must be in writing, and there must be follow up to ensure that the party is complying with its preservation obligations.
- Documentation should be maintained of all efforts to determine compliance with preservation obligations.

- Failure to follow appropriate procedures to ensure proper preservation of evidence is an area where attorneys may be sanctioned. See, e.g., Richard Green (Fine Paintings) v. McClendon, 262 F.R.D. 284, 292 (S.D.N.Y. 2009) (finding an entitlement to attorney’s fees that were to be apportioned between client and attorney, where failure to preserve documents was found).

- Litigation Hold Software exists that will help you track communications to custodians of responsive information about their litigation hold responsibilities, and keep track of potential legal evidence.
Step 2 & 3: Identification, Preservation & Collection

- Adequate preservation requires knowledge of where relevant ESI may reside.
- There are online questionnaires that may be used for this purpose. See, e.g., https://www.law.ufl.edu/_pdf/ediscovery/555_Identification_and_Preservation_Questionnaire.pdf.

- A data map may be useful.
Step 2 & 3 - Identification, Preservation & Collection

If you are seeking ESI from your opponent, you may want to conduct a deposition pursuant to Rule 1.310(b)(6), Fla. R. Civ. P., to inquire about:

- Potential burden issues associated with ESI discovery;
- Where data resides;
- Any issues with preservation or loss of data; and
- Specifics about search capability.

May want to start by meeting with custodians of relevant data to determine how they would locate responsive and relevant ESI. Also, discuss with them the words and phrases they commonly use in relevant ESI, in order to develop search terms to locate responsive ESI.

May want to speak with your opponent to determine what search terms they believe should be used to locate responsive data.
Step 2 & 3 – Identification, Preservation & Collection

- You need to know the limitations on search capability for whatever tool is being used when formulating search terms, or when communicating with your opponent regarding search terms. Depending on the search tool being used, searching may be limited to Boolean style search logic. Boolean searching allows you to use AND, OR and NOT to refine your search. It does not typically allow you to use terms and connectors (/s, +5, /p).

- The client may be able to search different fields in a document, such as the email subject, author, content, recipient, date fields.
- The client may be able to do “wild card” searching. Wild card searching involves placing a character (maybe * or !) in the search term, so that you receive documents containing variants of word spelling.
- The client may be able to do “root” searching. This involves the same concept as “wild card” searching.
- The client may be able to do “fuzzy” searching, to locate words that may be spelled different ways or may be commonly misspelled.

- There is also the possibility that the client is not fully experienced regarding the search capability of the product that they are using, in which event you may need to help them with technical assistance.
- There may also be circumstances where an outside vendor will have to perform the collection of data for the client.
- During this process, if you have access to your own IT consultant, it’s good to involve them as early as possible.
Step 2 & 3 - Identification, Preservation & Collection

- Whatever search terms you employ, you need to experiment with them.
- Find out the number of emails returned in a search - that is preliminary information that may be useful.
- Find out the volume of responsive documents that is returned with different searches. It is best to obtain overall file size, by file type. With this, you can estimate the burden of reviewing documents. First, you can estimate the average number of pages to be reviewed. See, e.g., https://www.lexisnexis.com/applieddiscovery/lawlibrary/whitepapers/ADI_FS_PagesInAGigabyte.pdf.
- Then you can develop a budget for review, given the time that you have to complete the production. https://www.edrm.net/resources/budget-calculators/.

Plan on an iterative process where you run searches and find out how they work. Things to be concerned about:

- The search returns a large volume of documents, such that review is going to be very, very costly. E.g., searching AHCA's emails for the word Medicaid or “AHCA.”
- The search returns a large percentage of nonresponsive documents.
- Sample search results to evaluate the extent that the search terms reliably yield responsive ESI.

Throughout the e-discovery process, you want to keep detailed records on what you did and why. Sometimes, the products you use can help with this. Otherwise, you will need to develop your own documentation at every step.
Step 2 & 3 – Identification, Preservation & Collection

Culling or filtering data may be done by:
- Limiting the time frame for ESI searching;
- Limiting the custodians whose ESI is searched (but this only works if you can limit the custodians to a reasonable number);
- Agreeing to limit review and production to certain file types;
- Agreeing to search terms that are not unduly burdensome; and
- Using analytics.

Analytics are useful:
- To perform relationship analysis (who is emailing whom about the issues in your case);
- On what date or dates is most relevant email sent or received; and
- For concept searching (program looks for similar concepts rather than the same search term).

Analytics may be an “add on” to whatever product you are using, and may only be available at an extra cost.

Deduplication of data – at the search level or globally;
- Why deduplication doesn’t remove all “duplicates.”
Step 4 – Review and Analysis

➡️ How to determine what tool to use to conduct your review and analysis of ESI:
   ➡️ What is the value of the case?
   ➡️ What tools do you have on hand?
   ➡️ What functions do you need to be able to perform?
   ➡️ How small is the responsive ESI likely to be?

For small cases and small amounts of ESI, there are cost effective options available. [link](https://www.americanbar.org/publications/gp_solo/2013/january_february/cost_effective_ediscovery_small_cases.html).

Potential Review Tool Functions for use in medium to large size cases:
   ➡️ Near Duplicate Analysis
   ➡️ Email Threading
Step 4 – Analysis and Review

- Computer Assisted Review (CAR) or Technology Assisted Review (TAR)
  - More helpful when you have both a large data set and a sufficient volume of responsive ESI in the data set.
  - You review a sample of the ESI data (usually about 200 emails) and tag them responsive or nonresponsive. Using your tagging, the program goes out and looks at another sample of ESI and tries to predict how you would tag the documents. It brings back the resulting sample, which you review. Usually it takes several phases of review for this to work. Have to get to a level of reliability with the results.
  - May also take your ideal responsive document, even one that you create, and it will go out and look for documents with similar concepts.

Step 4 – Analysis and Review

- Most review tools allow you to:
  - Conduct further searches within the data and save the searches;
  - Tag documents with preset tags (e.g., responsive, nonresponsive, privileged – work product or attorney client, and other subject matter tags as needed);
  - Insert comments;
  - Review documents in native format (if you have the native format software on the computer where reviews are conducted), in an image, and in a txt file; and
  - Facilitate the gathering of information necessary to generate a privilege log.

Step 4 – Analysis and Review

- Encrypted documents will require special treatment. Either you have to have the passwords needed to open the documents, or you will have to employ “password cracker” software.
Step 4 – Analysis and Review

- Whether or not to use a vendor?
  - Do you need a potential expert witness about e-discovery issues;
  - Do you need data loaded and ready for review in an expedited fashion;
  - Do you need access to review tools that are not available in house;
  - How big a data set are you dealing with; and
  - Do you need resources to help you load the data, train your staff on the use of the review tool, and to process the data.

- When selecting a vendor, look for vendors who price services by the Gigabyte. Pricing production on a per page basis is generally an outdated model.
- Consider vendors who allow you to do more, if you have the capability to do so.
- Beware of case management fees.

Step 4 - Processing

- Once you review the ESI, the next step is to process the data, including selecting which data is to be produced and which is to be reported on a privilege log.
- This may involve a different product.
- Need to either produce with the file formatting specifications provided by your opponent, or negotiate for a different format.
- Consider producing any spreadsheets in native format only.
Step 5 - Production

- How will you produce? CD, DVD, Thumb Drive, Portable Hard Drive, or File Share Protocol.
- What about confidential documents? Encrypting production. If you use a thumb drive or portable hard drive, you can use the technology on the thumb drive or portable hard drive to encrypt.

Step 5 - Production

- With confidential data, you must always ensure the security of the data in the production process.

Step 6 - Presentation

- You have synthesized your case down to a manageable set of exhibits, many (or all) of which are available electronically.
- There are several software programs that are geared toward trial presentations. PowerPoint presentations are a thing of the past. The programs allow you to bring up documents "on the fly," and highlight and enlarge significant passages in documents to focus the court on relevant information.
- Important if you are going to use this kind of technology to test it in your hearing room before your hearing or trial.
Step 6 - Presentation

- Use of video depositions that are synced to the respective page and line number in the transcript. This is best done when the court reporter furnishes the original or copy of the video and transcript deposition, but it can be done later.

E-discovery & Sanctions

- Section 120.569(2)(f), Fla. Stat.
- Rule 1.380, Fla. R. Civ. P.

QUESTIONS?
Evidence Issues in Administrative Proceedings

By

Marc Ito
Evidence at DOAH for Attorneys New to Administrative Practice
by Marc Ito

Earlier this year, an attorney unfamiliar with administrative practice, whose colleague would soon be appearing at the Division of Administrative Hearings (DOAH), asked my advice regarding the recent Florida Supreme Court case, *Florida Industrial Power Users Group v. Graham*, 209 So. 3d 1142 (Fla. 2017). I explained that the case was not a game changer. Rather, it clarified what administrative practitioners have long understood, that the rules of evidence do not strictly apply in administrative tribunals, and such tribunals have discretion to apply the Florida Evidence Code, if applied at all.

In *Florida Industrial Power Users Group*, Florida Power & Light Company (FPL) filed a petition with the Public Service Commission (PSC) seeking approval to purchase a power plant. The Florida Industrial Power Users Group (FIPUG) and the Office of Public Counsel (OPC) intervened in the proceeding. OPC and FPL reached a settlement and filed a motion seeking the PSC’s approval of the settlement agreement. FIPUG did not agree to the settlement and proceeded to hearing. At the hearing, FIPUG invoked the rule of sequestration of witnesses pursuant to section 90.616, Florida Statutes. The rule of sequestration – often referred to as "the rule" – requires witnesses to be excluded from a proceeding so that they cannot hear testimony of other witnesses. The PSC denied FIPUG’s request to invoke the rule. FIPUG appealed the denial, arguing that the PSC erred in failing to sequester the witness according to section 90.616.

The Supreme Court held that according to the principles of statutory construction, the scope of the Florida Evidence Code, as set forth in chapter 90, Florida Statutes, did not encompass administrative proceedings:

To ascertain legislative intent [of chapter 90], we first look to the other provisions within chapter 90 itself. Section 90.103, Florida Statutes (2015), entitled “Scope; applicability,” states:

(1) Unless otherwise provided by statute, this code applies to the same proceedings that the general law of evidence applied to before the effective date of this code.

(2) This act shall apply to criminal proceedings related to crimes committed after the effective date of this code and to civil actions and all other proceedings pending on or brought after October 1, 1981.

(3) Nothing in this act shall operate to repeal or modify the parol evidence rule.

§90.103, Fla. Stat. (2015). Under subsection (1), the Florida Evidence Code applies to the same proceedings to which the general law of evidence applied before July 1, 1979. However, as asserted by FPL and the PSC, the general law of evidence did not apply to administrative proceedings before that date. [citations omitted]. Therefore, under 90.103(1), Fla. Stat. (2015), the Florida Evidence Code does not strictly apply to administrative proceedings.
After holding that chapter 90 did not strictly apply in administrative proceedings, the Court turned to the question whether an administrative tribunal may apply the evidence code in administrative proceedings. Conveniently for administrative lawyers, the court held that whether the PSC had discretion to apply the evidence code in administrative proceedings turns on a pure analysis of chapter 120, Florida Statutes, itself:

Administrative proceedings are instead governed by chapter 120, Florida Statutes, known as the Administrative Procedure Act (APA). See §§ 120.51, 120.569(1), Fla. Stat. (2015). Although Chapter 90 sets forth the Florida Evidence Code, the APA contains its own guidance regarding the admissibility of evidence—including testimony—which is found in section 120.569(2)(g), Fla. Stat (2015). That section reads:

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.

§ 120.569(2)(g), Fla. Stat. (2015). This section exemplifies the longstanding general rule, described above, that the rules of evidence do not strictly apply in administrative proceedings. We find that the Commission has discretion on whether to apply the Florida Evidence Code and, in particular, the rule of sequestration to its proceedings.

The natural follow up-question is, if administrative tribunals under chapter 120 have discretion to apply, or not to apply, the Florida Evidence Code, what, exactly, are the rules of evidence applicable in a chapter 120 administrative hearing?

This two-part article is an attempt to provide a broad answer to that question. Part I of the article will examine the submission of evidence and burdens of proofs. This article will be limited to practice before DOAH and is intended for attorneys new to administrative practice. It will not cover practice in non-DOAH forums, such as the PSC and other administrative tribunals. It also will not cover evidentiary issues that can arise during discovery. It is intended as a roadmap to common evidentiary issues likely to arise in administrative proceedings without delving too deeply into any one issue.

First, some background regarding post-hearing administrative procedure is needed in order to understand why it is important to understand the rules evidence during an administrative hearing.

**Introduction: Why Is It Important to Understand The Rules of Evidence in Administrative Hearings?**

The short answer is that, unlike at a civil trial, not all "evidence" admitted into the record at an administrative hearing is sufficient to support an administrative law judge's (ALJ's) finding
of fact. "Evidence" in administrative hearings, then, is more the process of identifying what evidence can support an ALJ's findings of fact, and what evidence cannot.

The longer answer is that when an administrative hearing is complete and fully briefed, the administrative law judge will issue a recommended order that contains findings of fact and conclusions of law. In most cases, a state agency will then issue a final order that either adopts the ALJ's findings of fact and conclusions of law or modifies them. An agency's final order is then appealable to a district court of appeal. The catch is that state agencies and appellate courts have very limited authority to modify an ALJ's findings of fact. Persuading the ALJ that the evidence supports your version of the facts is crucial to the ultimate success of the case, as it will be very difficult for an agency or an appellate court to reverse the judge's findings of fact later.

An agency or an appellate court cannot reverse an ALJ's finding of fact unless, after reviewing the entire record, the agency or court determines that there is no competent substantial evidence supporting such finding of fact. This is a very high standard. If only a scintilla of evidence supports an ALJ's finding of fact – and even if a great amount of evidence weighs against it – a state agency or court has no authority to reverse that finding.

Substantial case law supports this high standard. An agency is not free to re-weigh the evidence or to reject findings of fact unless there is no competent, substantial evidence to support them. See Health Care and Ret. Corp. v. Dep't of Health and Rehabilitative Servs., 516 So. 2d 292, 296 (Fla. 1st DCA 1987); Heifetz v. Dep't of Bus. Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); Schumacker v. Dep't of Prof'l Regulation, 611 So. 2d 75 (Fla. 4th DCA 1982).

An agency may not attempt to resolve evidentiary conflicts, nor judge the credibility of witnesses. See Belleau v. Dep't of Envtl. Prot., 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); Dunham v. Highlands Cnty. Sch. Bd., 652 So. 2d 894 (Fla. 2d DCA 1995). Those evidentiary-related matters are the prerogative of the ALJ as “fact-finder” in administrative proceedings. See Heifetz v. Dep't of Bus. Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

An ALJ's decision to accept the testimony of one expert witness over another expert's testimony is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of competent substantial evidence of record supporting this decision. See Collier Med. Ctr. v. Dep't of Health and Rehabilitative Servs., 462 So. 2d 83, 85 (Fla. 1st DCA 1985); Florida Chapter of Sierra Club v. Orlando Utilities Comm'n, 436 So. 2d 383, 389 (Fla. 5th DCA 1983).

An agency has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. See Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). If the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding. See Dep't of Corrections v. Bradley, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987).

Finally, if there is any doubt about this high standard, chapter 120 provides for a severe penalty against an agency that improperly reverses a finding of fact:

APPEALS.—When there is an appeal, the court in its discretion may award reasonable attorney’s fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency’s discretion. Upon review of agency action that precipitates an appeal, if
the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court shall award reasonable attorney’s fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.

§120.595(5) Fla. Stat.(2017)(Emphasis supplied). So while it is discretionary for an appellate court to award attorney's fees in cases of a frivolous appeal or gross abuse of discretion, it is mandatory for an appellate court to award attorney's fees in cases when an agency reverses an ALJ's finding of fact that is supported by competent substantial evidence; and the fees awarded in such instances are for the appellate proceeding and the administrative proceeding below.7

As mentioned above, a unique feature of administrative hearings – as opposed to civil trials – is that not all evidence admitted into the record is capable of supporting a finding of fact. In an administrative hearing, it is possible for an ALJ to accept testimony or other evidence into the record, but later determine after briefing is complete, that such evidence is not competent and substantial, and therefore cannot support a finding of fact. Knowing the rules of evidence in administrative proceedings is important because such knowledge enables the administrative practitioner to identify competent substantial evidence that can support an ALJ's finding of fact, and distinguish other testimony, documents and media that cannot support an ALJ's finding of fact – thereby reducing the likelihood that a favorable outcome could later be reversed by an agency or an appellate court.

With this background in mind, the following outline reviews common issues with the introduction of evidence at DOAH.

I. Parties at DOAH Have the Right to Present Evidence

Parties have a right to present evidence at DOAH. The source of this right is chapter 120 itself. Section 120.57(1)(b), Florida Statutes, provides:

All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer’s recommended order, and to be represented by counsel or other qualified representative. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut the material.


II. How to Submit Evidence

The methods by which evidence may be presented are provided by section 120.569, Florida Statutes, and rule 28-106.213, Florida Administrative Code. Evidence may be presented by testimony under oath.9 Documentary evidence may be received in the form of a copy or excerpt. If a copy is submitted, the court will allow parties the opportunity to compare the copy with the original, if available.10
Video and telephone testimony is permissible "if requested and the necessary equipment is reasonably available." Fla. Admin. Code R. 28-106.213(5). The real-world consequence of this rule is that practitioners should request by motion in advance of the final hearing for a witness to appear remotely and must communicate with court staff to make sure the proper equipment will be available. DOAH staff will make its best efforts to accommodate technological needs, but they must know in advance what those needs are.

III. Burden of Proof and Evidentiary Standards

A. Preponderance of the Evidence

The general rule is that the party asserting the affirmative of an issue has the burden of proof by the preponderance of the evidence:

Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.

§120.57(1)(j) Fla. Stat. (2017). Exceptions to the general rule are in license application proceedings, penal proceedings, rule challenges and bid protests.

B. Licensure Proceedings

In a challenge to an agency's denial of an application for licensure, the applicant has the burden to prove by preponderance of the evidence that the applicant is entitled to the license. The applicant bears the "ultimate burden of persuasion of entitlement." Dep’t of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 779 (Fla. 1st DCA 1981).

C. Penal or Disciplinary Proceedings

In penal proceedings – for example, when an agency seeks to impose a fine, suspension or other penalty on a person or a license – the agency bears the burden of proof by clear and convincing evidence. See Dep’t of Banking and Finance v. Osborne, Stern and Co., 670 So. 2d 932 (Fla. 1996).

The Florida Supreme Court has held that clear and convincing evidence “requires more proof than a ‘preponderance of the evidence’ but less than ‘beyond and to the exclusion of a reasonable doubt.’” The clear and convincing evidence level of proof:

entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the
mind of the trier of fact a firm belief or conviction, without hesitation, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting with approval Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

D. Rule Challenges

The burden of proof in rule challenges falls on either the agency or the petitioner depending on the type of rule challenge. Section 120.56, Florida Statutes, provides for three types of rule challenges: challenges to proposed rules (rules that an agency has proposed but has not yet adopted), challenges to existing rules (rules that have been adopted by the agency and are in effect), and challenges to unadopted rules (agency statements that meet the definition of ‘rule’ but that have not been adopted pursuant to formal rulemaking procedure).

In a proposed rule challenge, the challenger has the burden of going forward with evidence. Then agency then has the ultimate burden to prove by preponderance of the evidence that the proposed rule is valid. See §120.56(2), Fla. Stat. (2017)

In an existing rule challenge, the challenger has the burden of going forward with evidence and proving by preponderance of the evidence that the rule is invalid. See §120.56(3), Fla. Stat. (2017).

In an unadopted rule challenge, the challenger's petition is required to include the text or description of the unadopted statement and provide facts sufficient to show that the statement meets the definition of an undaopted rule. If the challenger proves the allegations in its petition, the agency then has the burden to prove that rulemaking is not feasible or practicable. See §§120.56(4) and 120.57(1)(e) Fla. Stat. (2017).

E. Bid Protests

The burden of proof in bid protests likewise depends on the type of state action protested and is provided section 120.57(3)(f):15

In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. In a protest to an invitation to negotiate procurement, no submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency’s proposed action is contrary to the agency’s governing statutes, the agency’s rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency’s intended action is illegal, arbitrary, dishonest, or fraudulent.

§ 120.57(3)(f) Fla. Stat.
Conclusion

Part II of this article will examine issues related to the admissibility of evidence and will appear in the next issue of the newsletter.

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1 The Public Counsel is an attorney appointed to represent the "general public" in proceedings at the Public Service Commission. See § 350.061. Fla. Stat. (2017).
2 Id. at 1143.
3 The original effective date of the Florida Evidence Code was June 1, 1977. Ch. 76–237, § 8, Laws of Fla. However, in a series of bills, the Legislature amended the original date to instead read “July 1, 1979.” See ch. 77–77, § 1, Laws of Fla.; ch. 78–361, § 22, Laws of Fla.; ch. 78–379, § 1, Laws of Fla.” Florida Indus. Power Users Group v. Graham, 209 So. 3d 1142, 1144 at FN 2 (Fla. 2017).
4 The court rejected an argument by appellants that the court should have narrowly construed a previous PSC order as applying the rules of evidence to administrative proceedings before the PSC, and also rejected an alternative statutory construction that the "all other proceedings" language within section 90.103(2) included administrative proceedings because the case at bar was an "other proceeding" that occurred after October 1, 1981.
5 The competent substantial evidence standard is addressed in section IX.
7 This account of post-hearing administrative procedure is very much a thirty-thousand-foot view that excludes important procedural details. In 2011 and 2012 Administrative Law Judge Gar Chisenhall, published two articles aimed at attorneys new to administrative practice, one article geared more for lawyers representing the State, and another article geared more for lawyers in private practice. See What One Can (and Can't) Do with an Unfavorable Recommended Order and Practice Tips for Private Attorneys New to Administrative Law. Both are extremely helpful to new practitioners and are highly recommended. Both articles are available on the Administrative Law Section website: http://www.flaadminlaw.org.
8 References to Florida Statutes are to the 2017 Florida Statutes unless otherwise provided.
11 See Balino v. Dep’t of Health & Rehabilitative Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977).
12 JWC contains language that frequently comes up in litigation when there is a dispute over the order of presentation at trial or a confusion between the terms "burden of proof" and "burden of going forward with evidence." The burden of going forward with evidence is different than the burden of ultimate persuasion. Though this issue is beyond the scope of this article, practitioners should be aware of the following language from JWC:

This burden [of persuasion] is not subject to any "shifting" by the hearing officer, although it is entirely possible that a shifting of the burden of going forward with the evidence may occur during the course of the permitting proceeding. We think that part of the problem presented in this appeal stems from use of the term “burden of proof” to refer at times to the “burden of ultimate persuasion,” and at other times to the “burden of going forward with the evidence.”

...
Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails.

_JWC_ at 787.

13 See also Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Fox v. Dep’t of Health, 994 So. 2d 416 (Fla. 1st DCA 2008); Kany v. Fla. Eng’rs Mgmt. Corp., 948 So. 2d 948 (Fla. 5th DCA 2007); Dieguez v. Dep’t of Law Enf., Crim. Just. Stds. & Training Comm’n, 947 So. 2d 591 (Fla. 3d DCA 2007); Pou v. Dep’t of Ins. and Treas., 707 So. 2d 941 (Fla. 3d DCA 1998).

14 In re Graziano, 696 So. 2d 744, 753 (Fla. 1997).

15 The procedural intricacies of bid protests are complicated and beyond the scope of this article. For more guidance on bid protests See Edwardo S. Lombard, _Fla. Administrative Practice_, 10th Edition, §§11.1–11.26.
Evidence at DOAH for Attorneys New to Administrative Practice
by Marc Ito

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

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

IV. What Evidence is Admissible?

A. Any Evidence Rule - §120.569(2)(g), Florida Statutes

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

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

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

B. Similar Fact Evidence of Prior Violations

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

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

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

C. Hearsay and the Residuum Rule

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

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

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

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

Fla. Admin. Code. R. 28-106.213(3). These provisions provide a backdoor entry of the Florida Evidence Code's hearsay provisions into administrative proceedings. While the Any Evidence Rule admits a broad range of evidence that is inadmissible in civil trials, hearsay is only admissible if it supports or explains some non-hearsay evidence, falls into an exception to the hearsay rule under chapter 90, or, as one court put it, is supported by some "residuum" of evidence that is admissible in a civil trial:

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

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

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

_Bellsouth_, 654 So. 2d at 297.

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

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

_Dept. of Business and Professional Regulation v. Hamilton Downs Horsetrack, LLC, DOAH Case No. 15-3866, Final Hearing Transcript, p. 8 (Final Order, Aug. 24, 2016)(App. Sub. Nom. Hamilton Downs Horsetrack LLC v. Dept. of Business and Professional Regulation, First DCA Case No. 16-3876)._ After a hearsay objection, the court is likely to "note the hearsay" for the record and quickly move on. Since the hearsay will in all likelihood be admitted to the record, lengthy arguments over objections should be avoided unless one is arguing for a hearsay exception.

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

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

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

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

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration . . . §90.803, Fla. Stat. (2017). When offering a document as a business record it is necessary to lay a foundation by presenting evidence that the requirements of section 90.803(6) have been met. The usual method is to call the record custodian as a witness. However, in order to reduce costs and inconvenience, the rule permits foundation by certification or stipulation. If offering a certified document, it is necessary to follow the procedures provided in 90.803(6). In a complex case with sophisticated parties, it is not uncommon for the parties to exchange exhibits well ahead of hearing and stipulate to the authenticity of the exhibits while preserving all other evidentiary objections.

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

A statement that is offered against a party and is:

(a) The party’s own statement in either an individual or a representative capacity;

(b) A statement of which the party has manifested an adoption or belief in its truth;

(c) A statement by a person specifically authorized by the party to make a statement concerning the subject;
(d) A statement by the party’s agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship; or

(e) A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member’s participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

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

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

V. Pre-Hearing Orders

As provided in *Florida Industrial Power Users Group*, though the Florida Evidence Code in chapter 90 does not strictly apply at DOAH, ALJs have the discretion to apply the Evidence Code. When might an ALJ exercise such discretion? An ALJ is more likely to fall back on the Evidence Code in complex cases with sophisticated parties. Such discretion usually takes the form of a Pre-Hearing Order providing for additional evidentiary or procedural requirements. For example, DOAH uses a uniform Order of Prehearing Instructions in Certificate of Need cases. This order requires, among other things, that experts bring to their depositions all material on which they relied to form their opinion, which allows opposing counsel to elicit the expert's entire opinion at the deposition. This requirement has the effect of creating a new trial objection. If at trial an expert veers into an opinion that was not offered in the deposition, one can move to strike such testimony on the grounds that it violates the Order of Prehearing Instructions. One can make the same objection if an expert offers supporting documents that were not provided at the expert's deposition.

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

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

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

VII. Expert Testimony

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

The rules of evidence governing expert testimony in civil trials are in sections 90.701 - 90.706, Florida Statutes. A plain reading of the Any Evidence Rule indicates that ALJs have the discretion to accept expert testimony "whether or not such evidence would be admissible in a trial in the courts of Florida." However, as held in Florida Industrial Power Users Group, administrative tribunals have the discretion to apply the Florida Evidence Code. Given this unclear evidentiary environment, in complex cases with extensive expert testimony, it is likely the best practice to request an pre-hearing order, or to stipulate to an order, clarifying the rules applicable to expert testimony. For example, one can request a discovery order that the parties identify in advance all experts expected to testify, that all such experts provide their entire opinion at deposition, and that all documents supporting the opinion be provided prior to the deposition. With such an order, litigants should have all the discovery necessary to propound and attack expert opinions at trial.

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

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

VIII. Privilege

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

IX. Competent Substantial Evidence

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

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

95 So. 2d 912, 916 (Fla. 1957). The broad language in De Groot does not easily translate into a practical rule. However, the feeling of many administrative practitioners is that it is an exceedingly rare occurrence – if it has ever happened at all – for a district court of appeal to review a DOAH record on appeal, find that there is admissible evidence in the record that supports the reviewed finding of fact, but then hold that the evidence is not competent or substantial, thus reversing the finding of fact. Rather, in administrative proceedings, the competent substantial evidence rule really means that if a finding of fact is supported by any admissible evidence (irrespective of any analysis under De Groot and its progeny), such finding of fact is not likely to be second-guessed by a reviewing court.

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

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

2 See Scott v. Dep’t of Business and Professional Regulation, 603 So. 2d 519 (Fla. 1st DCA 1986); Harris v. Game and Fresh Water Fish Commission, 495 So. 2d 806 (Fla. 1st DCA 1986). But see Tri-State Systems, Inc. v. Dep’t of Transportation, 500 So.2d 212 (Fla. 1st DCA 1986) (“Unobjected-to hearsay . . . [is] usable as proof just as any other evidence.” S. Brent Spain and Gregg Riley Morton., Fla. Administrative Practice, 10th Edition, §4.36. For a deeper discussion of the case law regarding the residuum rule see id. at §§ 2.52, 4.36. Though the case law is a bit muddled, the greater weight of the case law appears to support this statement at this time. See e.g., Sunshine Chevrolet Oldsmobile v. Unemployment Appeals Com’n, 910 So. 2d 948, 951 (Fla. 2d DCA 2005)(holding that failing to object to hearsay does not foreclose a referee of the Unemployment Appeals Commission from determining that admitted documents were not within the scope of the business records exception and thus insufficient to support a finding of fact; declining to extend the holding in Tri-State Systems).

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

4 See Charles W. Ehrhardt, Ehrhardt's Florida Evidence, §§ 801.4 - 801.9. (2017 ed.).

5 For a deeper analysis of these requirements, See Charles W. Ehrhardt, Ehrhardt's Florida Evidence, § 803.6 (2017 ed.).

6 See Charles W. Ehrhardt, Ehrhardt's Florida Evidence, § 803.18 (2017 ed.).

7 This exception is also to be distinguished from the former testimony exception in section 90.804(2)(a). The former testimony exception provided by 90.804(2)(a) requires a showing that the declarant is unavailable. See Grabau v. Department of Health, 816 So. 2d 701 (Fla. 1st DCA 2002). However, a party admission exception under section 90.803(18) is admissible irrespective of the availability of the declarant.

8 See Charles W. Ehrhardt, Ehrhardt's Florida Evidence, § 803.18a (2017 ed.).

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

10 See GTO Inc. v. Unemployment Appeals Commission, 783 So. 2d 1201 (Fla. 1st DCA 2001).

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

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

13 See Lawnwood Medical Center, Inc. v. Agency for Health Care Administration, 678 So. 2d 421 (Fla. 1st DCA 1996), review denied 690 So. 2d 1299 (Fla. 1997).
14 The standard for reliability of expert testimony provides in Section 90.702, Florida Statutes is currently in doubt. In 2013, the Florida Legislature adopted the *Daubert* standard. Though adopted by the Legislature, the *Daubert* amendment has not been adopted by the Florida Supreme Court "to the extent that it is procedural, due to constitutional concerns raised, which must be left for a proper case or controversy." *In re Amendments to Florida Evidence Code*, 2017 WL 633770 (Fla. 2017). *See also* See Charles W. Ehrhardt, *Ehrhardt's Florida Evidence*, §702.3 (2017ed.).

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

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

By

Tara Price
Tabitha Harnage
Fred Aschauer
I. Recommended Orders—Issued by ALJ and Sent to Agency for Review and Final Agency Action

a. Exceptions—Filing Procedures & Requirements

i. Following the issuance of the Recommended Order, the agency will review the Recommended Order and determine whether to adopt the ALJ’s rulings in the agency’s Final Order.

ii. The parties use “exceptions” as a vehicle to challenge the ALJ’s factual and legal rulings.


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1 This outline is not intended to provide a comprehensive guide to administrative appeals or legal advice, but is instead a broad overview. This outline does not address all administrative actions, for example, those not subject to administrative review under Chapter 120 or more specialized matters, such as workers’ compensation or unemployment proceedings. Additional research should be done prior to relying on the information within this outline.

2 The author is thankful and appreciative for the advice and suggestions of Holland & Knight LLP partner Lawrence E. Sellers, Jr. and Administrative Law Judges Cathy M. Sellers and Gar Chisenhall in the preparation of this outline. In particular, it is highly recommended that practitioners begin their analysis with Judge Chisenhall’s very good article: “Practice Tips for Private Attorneys New to Administrative Law,” 86 Fla. B.J. 61 (Sept./Oct. 2012).

3 Note that the process for appealing non-final orders, such as discovery or other orders, is governed by a separate process. See § 120.68(1)(b), Fla. Stat. (“A preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings is immediately reviewable if review of the final agency decision would not provide an adequate remedy.”); see also Fla. R. App. P. 9.100 (providing that a petition to review non-final agency action under chapter 120 must be filed within 30 days of the rendition of the order, and such petition must be no more than 50 pages in length and contain the basis for invoking the court’s jurisdiction, the facts upon which the petitioner relies, the nature of the relief sought, and an argument in support of the petition with appropriate legal citations). A petitioner must show a departure from the essential requirements of law to grant the petition and quash the ALJ’s order. See, e.g., Valliere v. Fla. Elections Comm’n, 989 So. 2d 1242, 1243 (Fla. 4th DCA 2008); Eight Hundred, Inc. v. Dep’t of Revenue, 837 So. 2d 574, 575 (Fla. 1st DCA 2003).

The court will order the respondent to file a response to the petition if the petitioner can show “a preliminary basis for relief, a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy by appeal, or that review of final administrative action would not provide an adequate remedy.” Fla. R. App. P. 9.100(h).
iv. Parties have 15 days to file exceptions to findings of fact and conclusions of law contained in Recommended Orders. R. 28-106.217(1), Fla. Admin. Code.

v. Exceptions are filed with the agency clerk, not DOAH. See id.

vi. Each exception “shall identify the disputed portion of the recommended order by page number or paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record.” Id.

vii. It is a best practice to include a transcript along with your exceptions if you are challenging the ALJ’s findings of fact. See § 120.57(1)(l) (“The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.”)

viii. “Any party may file responses to another party’s exceptions within 10 days from the date the exceptions were filed with the agency.” R. 28-106.217(3), Fla. Admin. Code.

b. Limited Basis Upon Which Agency May Grant Exceptions

i. Conclusions of Law—The agency may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. § 120.57(1)(l), Fla. Stat.

1. Agency must state with particularity “its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.” Id.

2. A rejection or a modification of a conclusion of law may not “form the basis for rejection or modification of findings of fact.” Id.

ii. Findings of Fact—To reject a finding of fact, the agency must determine from a review of the record that the finding was “not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.” Id.

1. Good definition of competent substantial evidence—see DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).
2. Neither the amount of evidence nor any argument about how the ALJ should have weighed the evidence is sufficient to reject an ALJ’s finding of fact.

3. But—you may be successful by arguing that the finding of fact involves policy considerations best left to an agency’s discretion. See Baptist Hosp., Inc. v. Dep’t of Health & Rehab. Servs., 500 So. 2d 620, 623 (Fla. 1st DCA 1987) (“[M]atters infused with overriding policy considerations are left to agency discretion.”).

c. Exceptions—Importance of Preserving Your Record

i. If you plan to appeal an unfavorable Final Order, you must file exceptions to the Recommended Order! Goodwin v. Fla. Dep’t of Children & Families, 194 So. 3d 1042, 1048 (Fla. 1st DCA 2016) (“[A] party cannot argue on appeal matters which were not properly excepted to or challenged in the administrative tribunal.” (internal citation omitted)); Verizon Bus. Network Servs., Inc. v. Dep’t of Corr., 988 So. 2d 1148, 1150 (Fla. 1st DCA 2008) (“Ordinarily, an issue will not be considered on appeal unless the precise legal argument forwarded in the appellate court was presented to the lower tribunal.” (emphasis added)).

ii. If you fail to raise the issue as an exception, you may still be able to raise the issue on appeal—but you have to successfully argue fundamental error or excusable neglect. See, e.g., Henderson v. Dep’t of Health, Bd. of Nursing, 954 So. 2d 77, 81 n.2 (Fla. 5th DCA 2007).

iii. What if it’s an issue that the agency cannot address?


2. Evidentiary rulings by ALJ—Barfield v. Dep’t of Health, 805 So. 2d 1008, 1011-12 (Fla. 1st DCA 2001); Fla. Power & Light Co. v. State, 693 So. 2d 1025, 1028 (Fla. 1st DCA 1997) (Benton, J., concurring) (stating that the 1996 APA revisions were intended in part “to foreclose altogether evidentiary rulings in a final order entered after entry of a recommended order”).

3. This is untested waters. See G.E.L. Corp. v. Dep’t of Envtl. Prot., 875 So. 2d 1257, 1265 (Fla. 5th DCA 2004); Barfield, 805 So. 2d at 1012-13.
4. You still have a duty to develop a record if you want to raise an issue on appeal, even if the ALJ and/or agency cannot rule upon the matter. *See Sch. Bd. of Hillsborough Cnty. v. Tampa Sch. Dev. Corp.*, 113 So. 3d 919, 923 (Fla. 2d DCA 2013) (noting that an issue that could not have been decided by the ALJ, and thus was available for review on appeal, but advising that the issue still “could have been better developed below,” and because the appellant’s “effort to raise this issue . . . was feeble . . . our record on this issue is sparse”).

II. Final Order—Appealing Final Agency Action to the District Court of Appeal (Could Arise from ALJ in Rule Challenge Proceeding or from Agency after review of ALJ’s Recommended Order)

a. **Consider Your Grounds to Appeal**—Under Section 120.68(7), Florida Statutes, a court must affirm an agency’s final action unless it finds one of the following grounds:

(a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts;

(b) The agency’s action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact;

(c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure;

(d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or

(e) The agency’s exercise of discretion was:

1. Outside the range of discretion delegated to the agency by law;

2. Inconsistent with agency rule;

3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or

4. Otherwise in violation of a constitutional or statutory provision;

but the court shall not substitute its judgment for that of the agency on an issue of discretion.
b. Choice of District Courts

i. You may have a choice in which district court of appeal to file your notice of appeal.

ii. Section 120.68(2)(a), Florida Statutes, states: “Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.”

iii. Many agencies are headquartered in Tallahassee, which would be the First District Court of Appeal. If your client lives outside the First District Court of Appeal, you could choose between two district courts.

iv. Thus, it is a good practice to examine the case law or other issues in your case where the two district courts of appeal may disagree on the appropriate test or rule of law on a particular matter.

c. Filing Your Notice of Appeal

i. You must file your notice of appeal within 30 days of the rendition of the order that will be reviewed. Fla. R. App. P. 9.110(c).

ii. You must file two notices—one with the clerk of the lower administrative tribunal and one with the clerk of the district court of appeal. See id.

iii. Filing fees for your appeal are paid to the clerk of the district court, not to the agency. See id.

d. Motions for Rehearing Do Not Toll Your Time to Appeal

i. A motion for rehearing must be authorized by the agency in order for the motion to toll the time you have to appeal under Rule 9.020(i), Florida Rules of Appellate Procedure.

ii. Most motions for rehearing, however, are not authorized. Thus, a motion for rehearing generally will NOT toll the time to file your notice of appeal. See Sueltz v. State, 977 So. 2d 697, 698 (Fla. 1st DCA 2008).

iii. This is significant because you may be dealing with a government entity, such as a commission or board, that does not meet frequently, and thus may not rule on your motion for rehearing prior to the time when your ability to appeal the Final Order expires.
e. Motions for Stay

i. With limited exceptions, you are not granted a stay of the agency action simply by filing a notice of appeal. *See* Fla. R. App. P. 9.190(e)(1).

ii. A party seeking a stay must file a motion with the lower tribunal, or “for good cause shown,” may file a motion for stay in the district court. *Id.* R. 9.190(e)(2)(A).

iii. If an agency has suspended or revoked a license on a nonemergency basis, the petitioner may file his or her motion for stay with the district court on an expedited basis. *Id.* R. 9.190(e)(2)(C).

iv. The agency then has 10 days to respond to the petitioner’s motion for stay. *Id.*

v. The district court must grant the motion and issue a stay unless the agency “[u]nless the agency files a timely response demonstrating that a stay would constitute a probable danger to the health, safety, or welfare of the state.” *Id.*

vi. If the district court grants a stay, it is valid until a mandate issues, during the pendency of all review proceedings in Florida courts. *Id.* R. 9.190(e)(4).

f. Appellate Attorney’s Fees

i. Don’t forget your request for appellate attorney’s fees, if applicable.

ii. In addition to the other statutory or contractual bases that may be available, Section 120.595(5), Florida Statutes, provides for attorney’s fees if “the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency’s discretion.” If on appeal “the court finds that the agency improperly rejected or modified findings of fact in a recommended order; the court shall award reasonable attorney’s fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.” *Id.*

iii. Requests for attorney’s fees must be filed no later than the time for service of the reply brief. *See* Fla. R. App. P. 9.190(d)(1), 9.400(b)(1).
III. Did You Win?—Practical Tips for Pursuing Administrative Attorney’s Fees

a. Administrative Law Statutes That Might Authorize Attorney’s Fees

i. Section 120.595, Florida Statutes—Attorney’s Fees in Administrative Actions

1. Addresses fees in administrative actions filed under Sections 120.57(1) (administrative action), 120.56(2) (proposed rules), 120.56(3) and (5) (existing agency rules), 120.56(4) (agency statements defined as unadopted rules), Florida Statutes;

2. Also addresses availability of attorney’s fees in appeals of administrative actions. See § 120.595(5).

ii. Section 120.569(2)(e), Florida Statutes—Sanctions

1. Provides sanctions for filing pleadings, motions, or other papers for any improper purpose, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation.

iii. Section 120.569(2)(f), Florida Statutes—Discovery Violations

1. Permits the imposition of sanctions for discovery violations.

iv. Section 120.57(1)(e)4., Florida Statutes—Improper Agency Rejection of Unadopted Rule Determination

1. If the agency’s rejection of the ALJ’s determination regarding the unadopted rule does not comport with Section 120.57(1)(e)4., the court shall set aside the agency action and award prevailing party attorney’s fees.

b. Other Statutes That Might Authorize Attorney’s Fees

i. Section 57.105, Florida Statutes—Sanctions for Unsupported Claims or Defenses

ii. Section 57.111(1)(e)4., Florida Statutes—Prevailing Small Business Party Awards Under the Florida Equal Access to Justice Act

iii. Section 106.265(6), Florida Statutes—Attorney’s Fees and Costs for Filing Improper Campaign Finance Complaints
iv. **Section 112.317(7), Florida Statutes**—Attorney’s Fees and Costs for Filing Improper Public Employee Ethics Complaints

v. **Section 119.12, Florida Statutes**—Agency Violations of the Florida Public Records Act

vi. **Section 119.071(1)(d)2., Florida Statutes**—Improper Withholding of Public Records Under the Agency Attorney-Client/Work Product Exemption in Section 119.971(1)(d)2.

vii. **Section 456.072(4), Florida Statutes**—Agency Costs Related to Investigations and Prosecutions in Health Care Disciplinary Cases

c. **Remember Prerequisites: Do Any Notice Requirements Apply?**

i. Examples:

   1. **Section 57.105(4), Florida Statutes**—requires service of motion for attorney’s fees on opposing party 21 days prior to filing motion with the court

   2. **Section 120.595(4)(b), Florida Statutes**—an award of fees and costs is permissible only if the agency received notice that its statement is an unadopted rule at least 30 days prior to the petition raising claims under Section 120.56(4) was filed with the agency and the agency fails to publish notice of rulemaking during that 30-day period

d. **Keep Appropriate Records**

i. Do not block bill.

ii. Do not duplicate bill.

iii. Be careful about how many attorneys are working on the same project.
Practicing Before DOAH
Frederick L. Aschauer, Jr.

Pre-hearing practice

November 3, 2017

Follow the Yellow Brick Road

Prepare your case

Private practitioner
• Gather facts
• Gather law
• Pick experts
• Prepare petition/outline case

Agency lawyer
• Gather facts
• Gather law
• Pick experts
• Prepare administrative complaint/outline case
The petition

The administrative complaint*

Don’t be a Scarecrow – use your brain and avoid dismissal

* "Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed."

120.569(2)(c), Florida Statutes
How to avoid being the Scarecrow

Answer the following question correctly to avoiding being the Scarecrow.
If I only had a ....
A. a brain
B. a dime for every time some said "if I only had a brain" while walking by me
C. properly pled petition

Follow the Yellow Brick Road

The simple things

(a) The name and address of each agency affected and each agency’s file or identification number, if known;

(c) A statement of when and how the petitioner received notice of the agency decision;

Standing

(b) The [contact information] of the petitioner, if the petitioner is not represented by an attorney or a qualified representative; the [contact information] of the petitioner’s representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner’s substantial interests will be affected by the agency determination;
Are you a party?

“Party” is defined in section 120.52, Florida Statutes:

(13)(a) You’ve been named.
(13)(b) It’s my constitutional right!
(13)(c) Because I said so.
(13)(d) Local group.

Are you a third party?

“We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect.”

Guess the case

Me and my friends like to party!

“To meet the requirements of section 120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are ‘substantially affected’ by the challenged rule. Further, the subject matter of the rule must be within the association’s general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.”

GUESS THE CASE
**Rule challenge**

“To establish standing under the ‘substantially affected’ test, a party must show: (1) that the rule or policy will result in a real or immediate injury in fact; and (2) that the alleged interest is within the zone of interest to be protected or regulated.”

Office of Ins. Reg. and Fin. Serv. Comm’n v. Secure Enterprises, LLC, 124 So. 3d 332 (Fla. 1st DCA 2013)

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**Just the facts (yes, I know that’s not a Wizard of Oz reference)**

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency’s proposed action;

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**What are the rules?**

(f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency’s proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes.
We can see Oz from here

You have to ask the All Powerful Oz

[4.14]

You need to get the witch’s broom
What if my petition has been dismissed?

• “Dismissal of a petition shall, at least once, be without prejudice ... unless it conclusively appears from the face of the petition that the defect cannot be cured. The agency shall promptly give written notice to all parties of the action taken on the petition, shall state with particularity its reasons if the petition is not granted, and shall state the deadline for filing an amended petition if applicable.”

120.569(2)(c), Florida Statutes

Caselaw on dismissal

“[I]t is fair to narrow the factual matters in dispute and alert the agency to the undisputed aspects of the charges at issue.”

Brookwood Extended Care Ctr. v. Agency for Healthcare, 870 So. 2d 834 (Fla. 3d DCA 2003)

Caselaw on dismissal cont’d

• Court upheld DEP’s decision to dismiss petition because petitioner failed to demonstrate standing.
• At issue was whether the type of action was subject to APA challenge.

Herbits v. Bd. Of Trustees of Internal Improvement Trust Fund, 195 So.3d 1149 (Fla. 1st DCA)
Caselaw on dismissal cont’d

• Agency dismissed without “second bite of the apple”
• Contractual rights were not enough to demonstrate an injury-in-fact in a challenge to an environmental resource permit.

_Village of Key Biscayne v. Dep’t of Envtl. Prot., 206 So.3d 788 (Fla. 3d DCA 2016)_

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Caselaw on dismissal cont’d

“There is no stated authority for an agency to dismiss some, but not all, of a petition based on the agency’s view of the merits of the items or information in the petition. An agency’s disagreement with items and information in a petition is not grounds to dismiss parts of a petition before it is referred to the Division.”

_Martin County et al. v. All Aboard Fla. et al., Case Nos. 16-5718 & 17-2566 (DOAH May 24, 2017)_

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Caselaw on dismissal cont’d

“Florida Administrative Code Rule 28-106.201(2) requires a petition for hearing to include ‘specific facts’ and ‘an explanation of how the alleged facts relate’ to the rules and statutes the petitioner contends require reversal of the agency action. These requirements are not satisfied by an allegation such as ‘the proposed project will adversely affect endangered species and rule 28-106.201(2) prohibits activities that adversely affect endangered species.’ Rule 28-106.201(2) requires, in this example, that the petition identify the endangered species and explain how they will be adversely affected.”

_Dimare Fresh, Inc. v. Mosaic Fertilizer, LLC and Dept’ of Envtl. Prot., Case Nos. 17-0671 & 17-0672 (DOAH Feb. 9, 2017)_
Discovery

“After commencement of a proceeding, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure.” Rule 28-106.206, Florida Administrative Code

“[M]atters admitted during discovery in administrative litigation can furnish the basis for a finding of fact.” Twin City Roofing Const. Specialists, Inc. v. State, Dept. of Fin. Servs., 969 So. 2d 563, 565 (Fla. 1st DCA 2007)

“Trial by ambush is distant history . . . .” Northup v. Acken, 865 So.2d 1267 (Fla. 2004)

Speaking with the witness during a break

• “There is no recognized exception to the privilege for a communication between an attorney and client which occurs during a break in deposition. If a deponent changes his testimony after consulting with his attorney, the fact of the consultation may be brought out, but the substance of the communication generally is protected.” Haskell Co. v. Georgia Pac. Corp., 584 So. 2d 297 (Fla. 5th DCA 1996)

• “[W]e also explicitly hold that if attorney work product is expected or intended for use at trial, it is subject to the rules of discovery.” Northup v. Acken, 865 So.2d 1267 (Fla. 2004)

You might get a second bite at the apple

“As a matter of law, a party is not limited to ‘one chance’ to take a deposition.” Beekie v. Morgan, 751 So. 2d 694 (Fla. 5th DCA 2000)

Non-testifying experts

"Additionally, if an expert has been hired to conduct an investigation in anticipation of litigation, his reports and memoranda constitute materials compiled in preparation for trial. Therefore, he cannot properly be required to reveal the findings relevant to his investigation, absent proof of the adverse party’s need and inability to obtain the materials without undue hardship.” Wackenhut Corp. v. Crant-Henson Enterprises, Inc., 451 So.2d 900 (Fla. 2d DCA 1984)

Quoting Morgan v. Tracy, 604 So.2d 15 (Fla. 4th DCA 1992), the court states: “We also conclude that petitioners’ initial listing of the expert on their trial witness list did not constitute a waiver of the work product privilege. Now that petitioners have withdrawn the expert’s name from their trial witness list, respondent cannot depose the expert absent a showing of exceptional circumstances.” Bailey v. Miami-Dade County, 186 So.3d 1044 (Fla. 3rd DCA 2015)

Pre-hearing preparation is awesome

• Things not discussed –
  • Motion to Exclude Dr. Heknowstoomuch
  • The Battle of Those are Unacceptable Objections
  • To home rule or not
  • Preserving testimony
  • Etc.
• The presentation of your case depends on your diligence during the time leading up to the hearing
• 50% v 100% rule

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Chapter 120, Florida Statutes

- § 120.569: Decisions which affect substantial interests
  - Petition granted/denied within 15 days
  - Assignment of ALJ (if disputed issues of material fact)
  - Once at DOAH, proceed only as a party litigant

Chapter 120, Florida Statutes

- § 120.57(1): Hearings involving disputed issues of material fact
  - Initial Order, NOH and Order of Pre-Hearing Instructions
  - Conduct discovery (paper, depositions, subpoena)
  - Present evidence, witnesses
  - Evidence: Hearsay evidence may be used
Chapter 120, Florida Statutes

§ 120.57(2): Hearings not involving disputed issues of material fact
- Petition doesn’t allege disputed issues of material fact
- Send to an informal hearing with record
- Allow aggrieved party to present oral evidence or written statement in opposition to Agency’s action/inaction
- If Informal Hearing Officer finds disputed issue of material fact, send to DOAH for a § 120.57(1) hearing

Rule 28-106, Florida Administrative Code

- Applies to all proceedings in which the substantial interests of a party are determined by the agency: filings, timelines, counsel/qualified representative + petition requirements
- Rule challenges (proposed and current)
- Agency investigations or determinations of probable cause preliminary to agency action
- Mediation pursuant to § 120.573

Preparation

- Review petition
  - Timeliness / Substance
  - Waiver of 15 days?
  - Discovery
  - Prepare witnesses
  - Prepare trial notebook
  - Play devil’s advocate
Motion Practice
Rule 28-106.204

- Relinquish
  - After discovery/depositions
- Continue
- Limine
- Compel
- Sanctions

Organization

- Case in chief
  - Pending motions
  - Opening/closing statements
  - Order of witnesses
  - Presentation of evidence

Proposed Recommended Orders
Rule 28-106.215

- PRO
  - Findings of fact
  - Conclusions of law
  - Competent Substantial Evidence
  - Transcript + 10
  - Extend time for PROs based on agreement counsel & ALJ's leniency
Confidence

- You have prepared!
- You know your case better than anyone!
- Worst case scenario: file exceptions.

Victori dantur spolia!

- Preparation
- Motion Practice
- Organization
- Confidence