



# A Proposal For Professionalism Guidelines For Attorneys Practicing In Environmental and Land Use Cases Before the Florida Division of Administrative Hearings

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Almost all Florida attorneys are familiar with the Florida Bar's Creed of Professionalism. The Creed constitutes a set of guidelines that the Trial Lawyers Section of the Florida Bar generated in 1994, and has been amended several times since. The current version, promulgated jointly by the Conference of Circuit Court Judges, Conference of County Court Judges and the Trial Lawyers

Section, was generated in 2008. <http://www.floridabar.org/tfb/TFB-Profess.nsf/5d2a29f983dc81ef85256709006a486a/2f2668cdfd7b99e085256b2f006ccd15>

The Creed focuses on trial and pre-trial conduct. The Division of Administrative Hearings (DOAH), however, is not expressly subject to the Creed. Most of the members of the Environmental Section (ELULS)

appear before DOAH. Division practice overlaps, but is not identical to trial practice in our state's courts. This article notes several of undoubtedly many differences between the two forums, and proposes a "mini-me" version of the Creed to address those differences. No specific mini-creed is set forth. Nonetheless, we discuss significant issues that should

*See "Proposal," page 19*

## From the Chair

It's hard to believe that the holidays are upon us again and we are about to begin a new year. As we prepare for 2016, I am optimistic that the section will continue to benefit from the changes that have been implemented over the past few years and that the section will have a stable financial platform on which it can continue to build member services. Like many, the section was not immune to the economic downturn, but we are seeing improvement. There has been an increase in CLE attendance, both in person and online, and our

membership is stabilizing. In short, so far the programming changes are working, and you, our members are responding positively.

One of the biggest changes is the introduction of the section's newest CLE program: New, Different, Unusual & Uncertain – Environmental and Land Use Law Issues Facing all Floridians. This will be a two-day event in Orlando, January 28 & 29, 2016, at the Wyndham Resort, located on International Drive. The first day, will be dedicated to environmental topics, with

*See "Chair's Message," page 2*

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**CHAIR’S MESSAGE**  
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panels on the Waters of the US Rule and related litigation, endangered species, the status of water and land conservation following the passage of Amendment 1 in 2014, the cleanup of environmental contamination and redevelopment, ethical implications of sea level rise and climate change, and developing oil and gas law in Florida. The second day will be dedicated to land use topics including free speech and sign ordinances, golf course redevelopment, the regulation and use of drones, recent trends in community development districts, the regulation of charitable solicitation bins; and an update on the Bert Harris Act.

There will be a special discounted price for those of you that are able to

attend both days of programming, but the courses will also be available individually if you are able to join us only for one of the two days. As always, we will have plenty of opportunities for members to network and visit with our sponsors in the exhibition hall, including a reception at the end of the first day.

For those of you who are interested in Sponsorship Opportunities with ELULS, now is a great time to sign up so that you can benefit from full participation in the January CLE. There are three sponsorship packages available:

**Platinum Level (\$2,000).** This package includes booth space and admission for two at the two-day January CLE program, recognition as a sponsor at one Attorney/Affiliate mixer, logo and listing on the ELULS website


and link to sponsor’s website, and recognition in the ELULS Reporter.

**Gold Level (\$1,000).** This package includes booth space and admission for one at the two-day January CLE program, logo and listing on the ELULS website and link to sponsor’s website, and recognition in the ELULS Reporter.

**Silver Level (\$500).** This package includes a listing on the ELULS website and link to sponsor’s website, and recognition in the ELULS Reporter.

For more information on the January program, please see the brochure included in this edition of the Section Reporter or visit the ELULS website at <http://eluls.org/>. Registration is open, so please don’t delay and sign up. I look forward to seeing you there.





# MOVING?

## Need to update your address?

The Florida Bar’s website ([www.FLORIDABAR.org](http://www.FLORIDABAR.org)) offers members the ability to update their address and/or other member information.

The online form can be found on the website under “Member Profile.”

This newsletter is prepared and published by the Environmental and Land Use Law Section of The Florida Bar.

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# December 2015 Case Law Update

by Gary K. Hunter, Jr., Hopping Green & Sams

**Railroads may hold fee simple title to land acquired for the purpose of building railroad tracks. *Rogers v. United States*, 2015 Fla. LEXIS 2477 (Nov. 5, 2015).**

A group of landowners abutting a railroad corridor claimed that conveyances to the railroad by their predecessors in title granted only easements for a railroad right-of-way and did not convey fee simple title. Because the railroads had since abandoned the right-of-way, this gave the landowners the right to claim the land and therefore they argued that the conversion of the land to a recreational trail constituted a taking. The Supreme Court found that there was no state law, state policy, or factual considerations that limited the railroad's interest to an easement.

The landowners first looked to subsection (2) of section 4345 Revised General Statutes of Florida (1920) to argue that that the interests conveyed were merely "voluntary grants." There was no indication in the deeds, however, that the conveyances were voluntary or intended to convey easements. There is also no Florida decision stating that where the purpose of a grant was for a railroad right of way, that language indicated a voluntary grant. The court merely needed to look to the purpose of the grantor, and that purpose was to convey fee simple title. In Florida, railroads "may hold fee simple title to land acquired for the purpose of building railroad tracks," therefore there was nothing in Florida statutes to limit the railroad's interest.

The court also distinguished cases where courts have disfavored a recognition of fee simple title to "strips and gores" of land which later become abandoned. However, those cases were distinguishable because they involved purchasers of land subject to easements because of streets or roads. This argument failed to establish that there were any state policies that restricted the railroads interest in the land.

Lastly there was no factual consideration that limited the railroad's interest to an easement. The

landowner's argument that the occupation of property by the grantee prior to the conveyance was not supported by any case law.

**Development rights do not pass automatically with the conveyance of the fee interest in a DRI subparcel. There is no automatic transfer of a specific proportion (or even some reasonable portion) of the development rights allotted to a large parcel on a DRI master plan when a conveyance is made of title to only a portion of the large parcel. *Howard v. Murray*, 2015 Fla. App. LEXIS 16846 (Nov. 9, 2015).**

The facts of this case are exceedingly complicated (and much of the background is unrelated to the DRI issue), but ultimately the case began with the authorization of the Sandestin DRI on 2300 acres. The developer went bankrupt and the DRI was fragmented. The fragment at issue was Tract 3, which was part of a larger parcel that had been allotted 550,000 square feet of commercial development. When Tract 3 was conveyed the deed did not contain any language pertaining to the square footage of commercial development rights.

The court subsequently determined that in the absence of any language conveying development rights, no development rights were transferred from the DRI bundle of entitlements when Tract 3 was separated. "Obtaining title to real estate subject to a DRI order does not . . . in and of itself confer development rights." DRIs are designed to be flexible, with the assignment of development rights left to the discretion of the title-holders. Only when the DRI property is subdivided is there a determination, if any, whether any development rights are transferred. Therefore, there is no automatic transfer of a specific portion of development rights allotted to a larger parcel when it is later subdivided and conveyed.

**Co-lessees are parties to a quasi-judicial proceeding and therefore have a due process right to**

**participate more fully and in a meaningful way in the proceeding. *Waterview Towers Condos. Ass'n v. West Palm Beach*, No. 2014CA011943 (Fla. 15th Cir. Ct. Oct. 9, 2015).**

Waterview Towers Condominium is the co-lessee of a parcel of property on which the City of West Palm approved a zoning change application and a resolution for the construction of a multi-story hotel. Waterview Towers argued that they were denied procedural due process in the quasi-judicial proceedings at which the Development Orders were approved.

Two commission meetings were held to hear public concerns, and Waterview Towers was limited to three minutes to present their comments. Waterview Towers attempted before each meeting to intervene as parties, but was denied both times. Although Waterview Towers submitted a memorandum, Waterview Towers was denied the opportunity to cross examine city staff members or other witnesses of the developers.

The court held that Waterview Towers was an affected party that had been denied procedural due process. Waterview Towers was an affected party because they were co-lessees, with an "active property interest in the parcel of land." Because they were "more than mere adjoining landowners" or "interested parties," Waterview Towers had been denied a meaningful opportunity to fully participate by being restricted to three-minutes of speaking time at the hearings.

**The South Florida Water Management District's interpretation of the Everglades Forever Act does not require the implementation of additional water quality measures. *Florida Audubon Soc'y v. Sugar Cane Growers Coop. of Florida*, 171 So. 3d 790 (Fla. 2d DCA 2015).**

The Florida Audubon Society appealed a final administrative order, challenging South Florida Water Management District permits.

*continued...*

## CASE LAW UPDATE

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Audubon argued that the permits violated the following language of the Everglades Forever Act:

As of December 31, 2006, all permits, including those issued prior to that date, shall require implementation of additional water quality measures, taking into account the water quality treatment actually provided by the STAs and the effectiveness of the BMPs. As of that date, no permittee's discharge shall cause or contribute to any violation of water quality standards in the Everglades Protection Area. § 373.4592(4)(f)(4), Fla. Stat. (2013).

Prior to discussing Audubon's argument, the court briefly described the environmental regulation of the Everglades. First, Works of the District

(WOD) permits were required to implement Best Management Practices (BMPs) which were established by the SFWMD 1992 in order to reduce nutrients in agricultural discharges. Next, Stormwater Treatment Areas (STAs) would collect, store, and treat the discharges before flowing into the Everglades (this discharge is also regulated by permits). In 2003, the state adopted a phosphorous criteria level of 10 parts per billion, but because the limit was not being met SFWMD and FDEP adopted a Long-Term Plan. In 2012 the limit was still not being met, so a Restoration Strategy was developed, which did not include the implementation of more aggressive BMPs.

The permits in this case allowed farmers to discharge water into the STAs so long as they continued to implement BMPs. Audubon argued that the permits violated Everglades Forever Act because the permits did not impose "additional water quality" measures, and because the discharges

"cause and contribute" to ongoing water quality violations. The court rejected both arguments.

First, the language in (4)(f)(4) does not require more aggressive BMPs because the effectiveness of the current BMPs must be considered. The BMPs have exceeded its goals of reducing phosphorous by 25% even if the STAs have not yet reached the goal of 10 ppb. Moreover, the adoption of the Long-Term Plan and the Restoration Strategies fulfills the requirements of (4)(f)(4) because the District had discretion to select the most effective program.

Second, the SFWMD has determined that the discharge from the STAs is not a violation of water quality standards despite that the discharge is not meeting the 10 ppb threshold. Because the discharges are not in violation under STA permits, it would be inconsistent to hold that the same discharges would be in violation for the purposes of WOD permits.



## DEP Update 11/30/2015

Board of Trustees of the Internal Improvement Trust Fund v. Quintero and Patas: On October 7, 2014, the Board of Trustees issued a notice of violation (NOV) charging Respondents Quintero and Patas with violations of law associated with the construction of a walkway and dock on state-owned uplands and sovereign submerged lands on Marco Island. Subsequently, the Board of Trustees was authorized to file a First Amended NOV, which clarified the charges. The Board of Trustees sought to impose administrative fines and require certain corrective action. The Respondents requested an administrative hearing, which was conducted on April 17, 2015.

On August 3, 2015, the Board of Trustees issued a final order adopting the administrative law judge's (ALJ) recommended order in its entirety. The ALJ recommended that the Board of Trustees enter a final order sustaining the charges in the First Amended NOV, requiring the

Respondents to remove the walkway structure and dock within 20 days of entry of the final order, and requiring that within 20 days of the final order each Respondent shall pay an administrative fine of \$2,500. In addition, if the Respondents complete the removal of the structured as ordered, then the Respondents do not have to pay the fines. If the Respondents fail to complete the removal of the walkway structure and dock as ordered, the fine begins accruing at a rate of \$10,000 per day.

Chapter 62B-49: This rule chapter establishes procedures for processing applications for joint coastal permits under chapter 161, Florida Statutes, and rule chapters 62B-41 (Coastal Construction Criteria), 62-330 (Environmental Resource Permitting) and 18-18, 18-20 and 18-21 (relating to proprietary authorizations) of the Florida Administrative Code, for activities that require the above authorizations, and results in a single

permit. Amendments to the rule chapter became effective on November 19, 2015, and are intended to streamline and clarify permitting requirements. The revisions provide for electronic submittals of permit applications and other information as authorized by section 20.255(8), Florida Statutes.

Revisions were also made to implement changes to chapter 161, Florida Statutes, brought about by chapter 2012-65, Laws of Florida. Florida Administrative Code Rule 62B-49.0055 was added to provide a process and criteria for applying for and receiving expedited review of applications for beach nourishment and inlet management maintenance projects that have performed according to design expectations and have not resulted in a Department compliance and enforcement action. Additionally, most joint coastal permits will now allow for two maintenance or dredging disposal events or a permit life of 15 years, whichever is greater, unless a

*continued...*



## DEP UPDATE

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shorter duration is requested by the permit applicant.

**Rule 62-330.420:** Amendments to chapter 62-330 of the Florida Administrative Code were adopted to implement chapter 2013-92, Laws of Florida, amending section 373.118(4), Florida Statutes, which mandated the Department to adopt an environmental resource general permit for local governments to construct, operate, and maintain public mooring fields for up to 100 vessels. The rule requires the local government to prepare a mooring field management plan for Department approval, and to meet certain siting, design, and operational criteria in order to qualify for the general permit. This general permit additionally requires a sovereignty submerged lands lease for public mooring fields that will be located on state-owned submerged land. The new general permit, rule 62-330.420 of the Florida Administrative Code, became effective on November 19, 2015.

**Chapter 62-780:** In 2005, the Department adopted chapter 62-780 of the Florida Administrative Code, which sets forth contaminated site cleanup criteria. The rule chapter has not been substantially updated on a technical basis since the original rule adoption. In the intervening time, much has been learned with regard to applying Risk-Based Corrective Action (RBCA) principles to contaminated site management and closure.

In June 2015, the Department published a notice of rule development for chapter 62-780 in the *Florida Administrative Register* and held a workshop on June 30. On October 7, 2015, the Department published a second notice and held a second workshop November 4. The Department has been reviewing and updating these rules given technical advancement since its original adoption. The rule chapter will be modernized to incorporate these technical advancements and to facilitate contaminated site closure. In addition, a number of inconsistencies or incongruities that have been uncovered within

chapter 62-780 will be corrected. Specific topics that will be addressed by this rulemaking include evaluation of Incremental Sampling Methodology, revision of determination of leachability, the use and application of apportionment, and splitting the current rule 62-780.500 into two separate rules, one for emergency response actions and one for interim source removal. A third workshop is anticipated in the spring of 2016.

**Chapter 62-777:** In 2005, the Department adopted chapter 62-777 of the Florida Administrative Code, which establishes contaminant cleanup target levels applicable to site rehabilitation sites. Since that time, there have been many changes with regard to how to calculate appropriate risk-based cleanup target levels both in terms of the methods of calculation and the parameters used in the calculations. These developments lead to improved derivation of the appropriate cleanup target levels and

provide the correct degree of protection to human health and the environment. These new methods also reduce the amount of conservatism in some previous estimates to suitable levels thereby providing sufficient protectiveness while minimizing potential cleanup costs.

In June 2015, the Department published a notice of rule development for chapter 62-777 in the *Florida Administrative Register* and held a workshop on June 30. On October 7, 2015, the Department published a second notice and held a second workshop on November 4. The Department is proposing to review and update the method(s) for establishing cleanup target levels, the parameter values used, and develop updated cleanup target levels. In addition, Tables I - VI and Figures 1 - 10 will also be updated. This rulemaking is planned to run concurrently with the rulemaking for chapter 62-780. A third workshop is anticipated in the spring of 2016.



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# On Appeal

by Larry Sellers, Holland & Knight

*Note: Status of cases is as of November 6, 2015. Readers are encouraged to advise the author of pending appeals that should be included.*

## FLORIDA SUPREME COURT

*Hardee County v FINR II, Inc.*, Case No. SC 15-1260. Petition for review of the 2nd DCA's decision in *FINR v. Hardee County*, 40 FLW D1355 (Fla. 2d DCA June 10, 2015), in which the court held that "the Bert Harris Act provides a cause of action to owners of real property that has been inordinately burdened and diminished in value due to governmental action directly taken against an adjacent property," and certified conflict with the 1st DCA's decision in *City of Jacksonville v. Smith*, 159 So. 3d 888 (Fla. 1st DCA 2015) (question certified). Status: Notice filed on July 8, 2015. Note: the Florida Supreme Court already has accepted jurisdiction to review the question certified in *City of Jacksonville* (see below).

*R. Lee Smith, et al. v. City of Jacksonville*, Case No. SC 15-534. Petition for review of the 1st DCA's decision in *City of Jacksonville v. R. Lee Smith, et al.*, in which the majority of an *en banc* court determined that a property owner may not maintain an action pursuant to the Bert Harris Act if that owner has not had a law, regulation, or ordinance applied which restricts or limits the use of the owner's property. 159 So. 3d 888 (Fla. 1st DCA 2015). Status: Jurisdiction accepted on May 22; briefing tolled pending resolution of suggestion of mootness filed June 19, 2015. Note: Legislation enacted during the 2015 regular session clarifies that the Bert Harris Act is applicable only to action taken directly on the property owner's land and not to activities that are authorized on adjoining or adjacent properties. See Chapter 2015-142, *Laws of Florida*.

*SJRWMD v. Koontz*, Case No. SC 14-1092. Petition for review of decision in *SJRWMD v. Koontz*, 39 Fla. L. Weekly D925a (Fla. 5th DCA 2014), on remand from the Florida Supreme Court, in response to the reversal by the U.S. Supreme Court in *Koontz v.*

*SJRWMD*, 133 S.Ct. 2586 (2013). The U.S. Supreme Court concluded that an exactions taking may occur even in the absence of a compelled dedication of land and even when the unconstitutional condition is refused and a permit is denied. Subsequently, the 5th DCA adopted and reaffirmed its prior decision in *SJRWMD v. Koontz*, 57 So.3d 8 (Fla. 5th DCA 2009), which affirmed the judgment below. Judge Griffin dissented. Status: Notice filed May 30, 2014.

## FIRST DCA

*Speak Up Wekiva, Inc., et al., v. FFWCC*, Case No. 1D15-4596. Appeal from order denying motion for emergency temporary injunction of the hunting of the Florida Black Bear. Among other things, the appellants claim that the FFWCC rule establishing the hunt is unconstitutional, lacks a rational nexus to a legitimate state purpose and is arbitrary and capricious. Status: Notice of appeal filed October 8, 2015; motion for voluntary dismissal filed October 28, 2015.

*South Palafox Properties, LLC, et al. v. FDEP*, Case No. 1D15-2949. Petition for review of DEP final order revoking operating permit for construction and demolition debris disposal facility, DOAH Case No. 14-3674 (final order entered May 29, 2015). Among other things, the final order determines that the appropriate burden of proof is preponderance of the evidence and determines that DEP has substantial prosecutorial discretion to revoke (as opposed to suspend) the permit and that mitigation is irrelevant. Status: Notice of appeal filed June 25, 2015.

*Herbits, et al. v. Board of Trustees of the Internal Improvement Trust Fund*, Case No. 1D15-1076. Appeal from a final order dismissing an administrative petition filed by the appellants against the Board of Trustees of the Internal Improvement Trust Fund, which challenges the Trustees' decision to approve the City of Miami's request for a Partial Modification of Original Restriction to Deed No. 19447. The final order dismissed the petitioners' second

amended petition on the grounds that the second amended petition: (1) is based upon the defective premise that the land in question is sovereign submerged lands; (2) fails to show that the petitioners as third parties may challenge this minor and purely proprietary Board action under sections 120.569 and 120.57, Florida Statutes; and (3) fails to establish that the petitioners' substantial interests will be affected by the Board's action granting Partial Modification of Original Restrictions to Deed No. 19447. Status: Notice of appeal filed March 9, 2015.

*Capital City Bank v. DEP*, Case No. 1D14-4652. Appeal from DEP final order approving the county's application for after-the-fact CCCL permit, authorizing the county to construct a rock revetment on Alligator Drive in Franklin County. DEP Case No. 13-1210, DOAH Case No. 14-0517 (final order entered September 8, 2014). Status: Affirmed September 30, 2015.

## SECOND DCA

*Geraldson v. Manatee County, et al.*, Case No. 2D15-2057. Appeal from final order of the Administration Commission rejecting the ALJ's recommendation, and finding that the 2013 amendments to the Manatee County Comprehensive Plan are in compliance. AC Case No. ACC-14-001; DOAH Case No. 14-0940GM (final order filed May 6, 2015). Status: Notice of appeal filed May 11, 2015.

## THIRD DCA

*Miami-Dade County, et al. v. Florida Power & Light Co., et al.*, Case No.: 3D14-1467. Appeal from final order of the Siting Board certifying two nuclear units at Turkey Point as well as proposed corridors for transmission lines. Status: Oral argument held on August 31, 2015.

## FIFTH DCA

*McClash, et al., v. SWFWMD*, Case No. 5D-15-3424. Petition for review of SWFWMD final order issuing environmental resource permit (ERP) to

*continued...*

## ON APPEAL

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Land Trust for its proposed project on Perico Island in Bradenton, over contrary recommendation by the administrative law judge. The ALJ recommended that SWFWMD deny the ERP because practicable modifications were not made to avoid wetland

impacts and cumulative adverse effects and the project would cause significant environmental harm. In its final order, SWFWMD concludes that the mitigation proposed by the applicant is sufficient and that reduction and elimination of impacts to wetlands and other surface waters was adequately explored and considered. **Status:** Notice of appeal filed September 29, 2015.

*St. Johns Riverkeeper, Inc., et al., v. SJRWMD, et al.*, Case No. 5D-15-2831. Appeal from a final order of the St. Johns River Water Management District approving issuance of consumptive use permit for irrigation and support of a grass-fed cattle ranch. DOAH Case No. 14-2610 (final order entered July 15, 2015). **Status:** Notice of appeal filed August 13, 2015.



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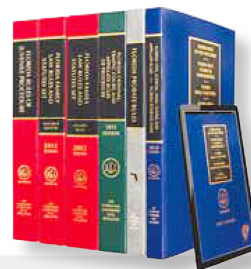
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**The Florida Bar Continuing Legal Education Committee and  
the Environmental & Land Use Law Section present**



# **New, Different, Unusual & Uncertain - Environmental & Land Use Law Issues Facing All Floridians**

**Course Classification: Intermediate Level**

**January 28 - 29, 2016**

**Wyndham Resort  
8001 International Drive  
Orlando, FL 32819  
(407) 351-2420**

**Course No. 2110R/2111R/2025R**



# Schedule of Events

## Thursday, January 28, 2016

### **New, Different, Unusual & Uncertain - Environmental Law Issues Facing All Floridians (2110R)**

8:00 a.m. – 8:25 a.m.

#### **Late Registration**

8:25 a.m. – 8:30 a.m.

#### **Opening Remarks/Introduction**

8:30 a.m. – 9:45 a.m.

#### **Session I: Clearer or More Confusing? Final Waters of the US Rule Change Remains Murky**

*Christina D. Storz (U.S. Army Corps of Engineers)*

*Michelle Diffenderfer (Lewis, Longman, & Walker, P.A.)*

*Greg Powell P.E. (Golder & Associates)*

9:45 a.m. – 10:35 a.m.

#### **Session II: Environmental Issues with Golf Course Redevelopment**

*C.F. "Trey" Mills (Rogers Towers)*

*James Oliveros, P.G. (Golder & Associates)*

10:35 a.m. – 10:50 a.m.

#### **Break**

10:50 a.m. – 12:05 p.m.

#### **Session III: Endangered and Managed Species Update: Panthers, Turtles and Bears, Oh My!**

*Ralf G. Brookes*

*Harold B. "Bud" Vielhauer (Florida Fish and Wildlife Conservation Commission)*

*Ann Marie Lauritsen (U.S. Fish and Wildlife Service)*

12:05 p.m. – 1:15 p.m.

#### **Lunch (Included)**

1:15 p.m. – 2:05 p.m.

#### **Session IV: Florida's Water and Land Conservation Amendment: Where Are We Now?**

*Preston T. Robertson (Florida Wildlife Federation)*

*W. Clay Henderson (Institute for Water and Environmental Resilience - Stetson University)*

*Gregory M. Munson (Gunster Law Firm)*

2:05 p.m. – 2:55 p.m.

#### **Session V: How Clean is Clean Enough: Implications of the Proposed Waste Cleanup Rules**

*Robyn D. Neely (Akerman LLP)*

*Keith Tolson, Ph.D. (Geosyntec Consultants)*

2:55 p.m. – 3:10 p.m.

#### **Break**

3:10 p.m. – 4:25 p.m.

#### **Session VI: Ethical Implications of Sea Level & Climate Change to the Environmental Practitioner**

*Thomas R. Armstrong, PhD (Madison River Group, LLC)*

*Keith W. Rizzardi (Jones, Foster, Johnston & Stubbs, P.A.)*

4:25 p.m. – 5:15 p.m.

#### **Session VII: Florida's Developing Oil and Gas Law and Regulation**

*Brian Accardo (Florida Department of Environmental Protection)*

*Timothy Riley (Hopping Green & Sams)*

5:15 p.m. – 6:45 p.m.

#### **Reception**

## Friday, January 29, 2016

### **New, Different, Unusual & Uncertain - Land Use Law Issues Facing All Floridians (2111R)**

8:25 a.m. – 8:30 a.m.

#### **Opening Remarks**

8:30 a.m. – 9:20 a.m.

#### **Session I: Drones in Land Use: Views from Above**

*Steven Hogan (Ausley McMullen)*

*Jon Harris Maurer (Hopping Green & Sams)*

9:20 a.m. – 10:10 a.m.

#### **Session II: Ethics in Digital Permitting**

*Carlyn H. Kowalsky (SFWMD)*

*Christine N. Senne (Senne Law Firm)*

10:10 a.m. – 10:25 a.m.

#### **Break**

10:25 a.m. – 11:15 a.m.

#### **Session III: Recent Trends in Community Development Districts**

*Tucker F. Mackie (Hopping, Green & Sams)*

*Brett A. Sealy (MBS Capital Markets, LLC)*

11:15 a.m. – 12:05 p.m.

#### **Session IV: Reed v. Gilbert: The Response of Courts, Industry and Governments**

*Susan L. Trevarthen, FAICP (Weiss, Serota, Helfman, Cole & Bierman)*

*William D. Brinton (Rogers Tower)*

12:05 p.m. – 1:15 p.m.

#### **Lunch (Included)**

1:15 p.m. – 2:55 p.m.

**Session V: Land Use Issues in Golf Course Redevelopment**

*Derek P. Rooney (Gray Robinson)*

*Paula N. C. McMichael, AICP (Hole Montes Engineering)*

*Alexis V. Crespo, AICP (Waldrop Engineering)*

2:55 p.m. – 3:10 p.m.

**Break**

3:10 p.m. – 4:00 p.m.

**Session VI: Charitable Donation Bins, Free Speech and Land Use Regulation**

*Patrick W. Krechowski (Gray Robinson)*

*Elisabeth Dang, AICP (City of Orlando)*

4:00 p.m. – 4:50 p.m.

**Session VII: Bert Harris Act Update**

*Gary K. Hunter, Jr. (Hopping, Green & Sams)*

*Michael R. Bray, Jr. (Orange County)*

## CLE Credits

**New, Different, Unusual & Uncertain - Environmental Law Issues Facing All Floridians (2110R)**

General: 8.5 hours    Ethics: 1.5 hours

**CERTIFICATION PROGRAM**

(Max. Credit: 8.5 hours)

City, County, Local Gov't: 8.5 hours

State & Federal Gov't & Administrative Practice: 8.5 hours

**New, Different, Unusual & Uncertain - Land Use Law Issues Facing All Floridians (2111R)**

General: 8.0 hours    Ethics: 1.0 hours

**CERTIFICATION PROGRAM**

(Max. Credit: 8.0 hours)

City, County, Local Gov't: 8.0 hours

State & Federal Gov't & Administrative Practice: 8.0 hours

**New, Different, Unusual & Uncertain - Environmental & Land Use Law Issues Facing All Floridians (2025R)**

General: 16.5 hours    Ethics: 2.5 hours

**CERTIFICATION PROGRAM**

(Max. Credit: 16.5 hours)

City, County & Local Government: 16.5 hours

State & Federal Gov't & Administrative Practice: 16.5 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at [www.floridabar.org](http://www.floridabar.org) for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

### Refund Policy

A \$25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. \$65 withheld to cover the cost of lunch.

### Hotel Reservations

A block of rooms has been reserved at The Wyndham Resort, at the rate of \$165 single/double occupancy. To make reservations, call The Wyndham Resort directly at (407) 351-2420. Reservations must be made by 1/6/16 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

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# Registration

## Register me for New, Different, Unusual & Uncertain - Environmental & Land Use Law Issues Facing All Floridians

ONE LOCATION: (378), WYNDHAM ORLANDO RESORT, ORLANDO (JANUARY 28 - 29, 2016)

TO REGISTER OR ORDER AUDIO CD OR COURSE BOOKS BY MAIL, SEND THIS FORM TO The Florida Bar, Order Entry Department, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD \$25.00. On-site registration is by check only.

Name \_\_\_\_\_ Florida Bar # \_\_\_\_\_

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Phone # \_\_\_\_\_ E-mail\* \_\_\_\_\_

\*E-mail address is required to receive electronic course material and will only be used for this order. CLB: Course Nos. 2025R/2110R/2111R

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### REGISTRATION FEE (CHECK ONE):

#### Thursday, 1-28-16 (2110R)

- ☐ Member of the Environmental & Land Use Law Section: \$235
- ☐ Non-section member: \$275
- ☐ Full-time law college faculty or full-time law student: \$170
- ☐ Persons attending under the policy of fee waivers: \$65

#### Friday, 1-29-16 (2111R)

- ☐ Member of the Environmental & Land Use Law Section: \$225
- ☐ Non-section member: \$265
- ☐ Full-time law college faculty or full-time law student: \$165
- ☐ Persons attending under the policy of fee waivers: \$65

#### Thursday & Friday 1-28 & 1-29, 2016 (2025R)

- ☐ Member of the Environmental & Land Use Law Section: \$410
- ☐ Non-section member: \$450
- ☐ Full-time law college faculty or full-time law student: \$290
- ☐ Persons attending under the policy of fee waivers: \$130

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Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If tax exempt, include documentation with the order form.

### New, Different, Unusual & Uncertain - Environmental Law Issues Facing All Floridians (2110R) (Thursday Session)

- ☐ **AUDIO CD (2110C)** (includes Electronic Course Material)
- \$240 plus tax (section member); \$280 plus tax (non-section member)
- + TAX \$ \_\_\_\_\_ TOTAL \$ \_\_\_\_\_

#### ☐ **COURSE BOOK ONLY (2110M)**

Cost \$60 plus tax  
+ TAX \$ \_\_\_\_\_ TOTAL \$ \_\_\_\_\_

### New, Different, Unusual & Uncertain - Land Use Law Issues Facing All Floridians (2111R) (Friday Session)

- ☐ **AUDIO CD (2111C)** (includes Electronic Course Material)
- \$240 plus tax (section member); \$280 plus tax (non-section member)
- + TAX \$ \_\_\_\_\_ TOTAL \$ \_\_\_\_\_

#### ☐ **COURSE BOOK ONLY (2111M)**

Cost \$60 plus tax  
+ TAX \$ \_\_\_\_\_ TOTAL \$ \_\_\_\_\_

### New, Different, Unusual & Uncertain - Environmental & Land Use Law Issues Facing All Floridians (2025R) (Both Sessions)

- ☐ **AUDIO CD (2025C)** (includes Electronic Course Material)
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- + TAX \$ \_\_\_\_\_ TOTAL \$ \_\_\_\_\_

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Related Florida Bar Publications can be found at <http://www.lexisnexis.com/shop/flabar/default.page>



# Law School Liaisons

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## Stetson University College of Law Hosts Wetlands Workshop

by Erin Okuno, Foreman Biodiversity Fellow, Institute for Biodiversity Law and Policy, Stetson University College of Law)

On November 12, 2015, Stetson University College of Law hosted the Third Annual Environmental Law Institute-Stetson Wetlands Workshop. This year, over 50 regulators, industry experts, wetland scientists, attorneys (including several members of the ELULS), law students, and graduate students from Florida and around the country attended the event. Participants were also able to join the workshop via live videoconferencing.

The topic of the workshop was “Wetlands Mitigation and Long-Term Stewardship: Financial Challenges and Title Issues.” Two engaging and thought-provoking panel discussions addressed best practices for long-term funding mechanisms at wetland mitigation sites and title issues at mitigation sites. The panelists included Jenny Thomas (U.S. Environmental Protection Agency), Greg DeYoung (Westervelt Ecological Services), John Emery (Southwest Florida Water Management District), Bob Polin (National Fish and Wildlife Foundation), Paul Boudreaux



(L-R) Professor Royal Gardner, Jenny Thomas, Greg DeYoung, John Emery, and Bob Polin participated in the first panel discussion at the workshop.

(Stetson University College of Law), Gray Stevens (EarthBalance Corporation), Seth Johnson (U.S. Army Corps of Engineers—Jacksonville District), Clay Henderson (Stetson Institute for Water and Environmental Resilience), and Palmer Hough (U.S. Environmental Protection Agency).

To begin the workshop, Jenny Thomas delivered the Edward and Bonnie Foreman Biodiversity Lecture, titled “Long-Term Stewardship – Lessons from California Mitigation Banks.” This year’s workshop also included a morning field trip to the Old Florida Mitigation Bank.



Attendees, speakers, and Stetson Law students visited the Old Florida Mitigation Bank before the workshop.

The proceedings from the Wetlands Workshop will again form the basis for a special issue of ELI’s *National Wetlands Newsletter*, which is expected to be published in the spring. Thank you to everyone who attended the workshop and who supported the event. We are especially grateful to the ELULS for its special grant, which enabled us to host the workshop this year.

*Law School Liaisons, continued...*

## UF Law Update

by Mary Jane Angelo, Director, Environmental and Land Use Law Program, University of Florida Levin College of Law

### Environmental Capstone Series Focuses on Ocean, Coastal Issues

"Ocean and Coastal Law" is the theme for the 2016 Spring Environmental Capstone Colloquium, as announced by Christine Klein, Chesterfield Smith Professor and Director of the LL.M. Program in Environmental and Land Use Law. Colloquium sessions will be held January 21-March 24, 2016, at the University of Florida Levin College of Law.

Speakers and topics include:

- Michael Burger, Executive Director, Sabin Center for Climate Change Law, Colombia Law School, "Offshore Oil Drilling";
- Robert R.M. Verchick, Gauthier-St. Martin Eminent Scholar and Chair in Environmental Law, Loyola University New Orleans College of Law, "When Nature Bats Last: Climate Resilience in the No-analog Future";
- Josh Eagle, Solomon Blatt Professor of Law, University of South Carolina School of Law, "On the Not-So-Mysterious Disappearance of Ocean Zoning";
- Donna R. Christie, Elizabeth C. & Clyde W. Atkinson Professor Emerita, Florida State University College of Law, "Beaches, Boundaries, and SOBs"; and
- Robin Kundis Craig, William H. Leary Professor of Law, University of Utah College of Law, "Resilience Thinking for Marine Fisheries".

The Capstone Colloquium is sponsored by Alfred J. Malefatto, Shareholder, Lewis, Longman & Walker, P.A., West Palm Beach, FL, and Hop-ping Green and Sams, Tallahassee, FL.

### Annual Conference Scheduled for February

The Levin College of Law's annual Public Interest Environmental Conference is scheduled for February 11-13, 2016, at the law school. The theme of the conference, which complements the theme of the Capstone Colloquium, is "Five Oceans, One Earth". The conference will examine the state of our planet's oceans and anthropogenic activities that affect it.

Keynote speakers will be Dr. David Guggenheim, Ocean Explorer and Educator, Founder & President, Ocean Doctor, and Ian Urbina, *The New York Times* writer and author, *Outlaw Oceans*.

Conference highlights include:

- Climate change roundtable
- Florida Bar/Environmental Law Institute Gulf of Mexico restoration workshop

• Panels covering:

- Ocean and near shore aquaculture
- The high seas & living marine resources
- Coastal community resiliency
- Oceanic pollution
- Endangered marine species
- Port expansion and the St. Johns River
- Offshore drilling
- Caribbean coral reefs

Additional information is available from [uflawpiec@gmail.com](mailto:uflawpiec@gmail.com).

### Spring Break Course Examines Marine/Coastal Law

UF Law's ELULP Program will offer the South Florida Bahamas Ecoregion Spring Break Field Course, which focuses on marine and coastal law. The two-credit course begins in densely developed South Florida with a look at land and water use in and around Biscayne Bay. Participants then fly to Nassau to study the unique law of the Bahamas and the Commonwealth Caribbean and the specific issues that fact this archipelagic nation. It concludes with an island hopper to one of the Bahamian "family islands" to experience those issues firsthand.

Additional information is available from Tom Ankersen at [ankersen@law.ufl.edu](mailto:ankersen@law.ufl.edu).

### ELULP Fall Newsletter Available

The Fall 2015 ELULP Newsletter focuses on faculty scholarship and student opportunities. It is available at: <http://www.law.ufl.edu/wordpress/wp-content/uploads/2015/11/UFLawELULPFallNewsletter2015.pdf>.



*Law School Liaisons, continued...*



## A Fall 2015 Update from the Florida State University College of Law

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of our College of Law alumni and students. It also summarizes the rich array of programs the College of Law is hosting this fall.

### Recent Alumni Accomplishments

- **Timothy P. Atkinson**, a shareholder with the firm of Oertel, Fernandez, Bryant & Atkinson, P.A., was named to the Florida Trend's Florida Legal Elite 2015 in the area of Environmental & Land Use law. Board Certified in State and Federal Government and Administrative Law, Mr. Atkinson is also one of only 296 attorneys to be named Florida Legal Elite and is also Board Certified. In addition, Mr. Atkinson was appointed to serve a three year term on The Florida Bar's State & Federal Government & Administrative Practice Certification Committee.
- **Christine Clolinger** recently received the Florida Bar Animal Law Committee student award for Outstanding Service. She has accepted a position as an associate with Davis & Fields, PC in Daphne, Alabama.
- **Jacob Cremer** has moved his environmental, land use, and property rights practice to Stearns Weaver Miller Weissler Alhadeff & Sitterson, PA in Tampa. He was recently selected for the 2016 Class of Leadership Tampa Bay, a regional one-year leadership program.



Atkinson



Diaz



Turner

- **Daria Burgess Diaz**, an attorney with Stone Pigman Walther Wittmann, LLC in New Orleans, Louisiana, was named by Chambers & Partners to its 2015 *Chambers U.S.A.: America's Leading Lawyers for Business* guide. This is the fifth year she has been listed in the Louisiana Environmental Law section. **Russel Lazega** released a book titled *Managing Bubbie*. The book has already received four awards (finalist in two categories for the Independent Author Network 2015 Book of the Year, Honorable Mention in the 2015 New York Book Festival and Honorable Mention in the 2015 Hollywood Book Festival).
- **Terry Cole** was recently selected by his peers for inclusion in *The Best Lawyers in America* 2016 in the field of Environmental Law.
- **Matthew Leopold** was appointed to the Federal Judicial Nominating Commission for the Northern District of Florida.
- **Benjamin Melnick** moved from the Litigation Defense section of the Florida Department of Environmental Protection's Office of General Counsel to the Department's Program section, now advising the Division of Solid Waste (Solid Waste permitting, Financial Assurances, Waste Reduction (recycling), Waste Cleanup and the Siting Coordination Office (the Electrical Power Plant and Transmission Line Siting Act).
- **S. Brent Spain** co-authored "Administrative Adjudication" in the recently released tenth edition of *The Florida Bar's Florida Administrative Practice* treatise. He also became Board Certified by The Florida Bar in City, County & Local Government Law. Mr. Spain is a partner in the Orlando office of Theriaque & Spain, which practices statewide primarily in the areas of local government, land use/zoning, and administrative law.
- **Austin Turner** has joined Henderson, Franklin, Starnes & Holt, a 56-attorney firm in Fort Meyers, Florida. His primary areas of practice will be land use, zoning, and environmental law.
- **Jeff Wood** spoke to students at the Florida State University College of

### ALUMNI NEWS WANTED!

The College of Law wants to hear from alumni!  
Please send accomplishments and updates to [lhatcher@law.fsu.edu](mailto:lhatcher@law.fsu.edu).  
We look forward to sharing your news.

*Law School Liaisons, continued...*

## LAW SCHOOL LIAISONS

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Law on November 9. He is a partner in the Washington, DC office of Balch & Bingham LLP.

- **Ellen Wolfgang** is now serving as staff director for the Senate's Environmental Protection and Conservation Committee.

### Recent Student Achievements

**Sarah Logan Beasley** participated in an invitation-only Harvard Food Law Summit in October.

**Dylan Howard** was awarded the Gunster Environmental Law Scholarship and Internship and will begin clerking at the firm in January.

**Stephanie Schwarz**'s recent article, entitled "Knot Your Average Bird: A Case Study of the Rufa Red Knot in the Face of Climate Change?," was accepted for publication by the *Lewis & Clark Animal Law Review*.

### Fall 2015 Events

Our fall semester features several interesting and timely environmental law programs. More information on these events is available at <http://law.fsu.edu/academics/jd-program/environmental-energy-land-use-law/environmental-program-events>. We hope Section members will join us for one or more of these programs.

#### Fall 2015 *Environmental Forum*

The Fall 2015 *Environmental Forum*, entitled "The Clean Power Plan and Renewable Energy for Florida," was held on October 21. The *Forum* featured **Michael Sole**, Vice President for State Governmental Affairs, Next Era Energy Resources/Florida Power & Light; **Matthew Leopold**, of Counsel, Carlton Fields Jorden Burt; and **Kevin Auerbacher**, Director of Policy & Electricity Markets and Regulatory Counsel, SolarCity. Professor **Hannah Wiseman** moderated the *Forum*. Florida Bar CLE credit is available. The *Forum* is available via the following link: <http://mediasite.capd.fsu.edu/Mediasite/Play/f526a58544cb4a75b-c7323a8ab11da1e1d>.



Environmental Law Society



(Left to right) Wiseman, Sole, Auerbacher, and Leopold

*Law School Liaisons, continued...*



## LAW SCHOOL LIAISONS

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### Fall 2015 *Distinguished Environmental Lecture*



Wiener

**Jonathan Wiener**, William R. and Thomas L. Perkins Professor of Law, Duke University School of Law, delivered the fall Distinguished Environmental Lecture on November 19

from 3:30 p.m. - 4:30 p.m. in Room 310 with a reception to follow in

the Rotunda. CLE credit approval is pending. To view the lecture via livestream, please visit the following link: <http://mediasite.capd.fsu.edu/Mediasite/Play/4adad9985ce245d081199d2d09ab1f001d>

### Environmental Certificate and Environmental LL.M. Enrichment Series

The Environmental Certificate and Environmental LL.M. Enrichment Series welcomed three speakers during the fall semester. **Anne Harvey**, Save the Manatee Club; **Mary Jane Angelo**, University of Florida Levin College of Law; and **James Coleman**, University of Calgary Faculty of Law. In addition to these speakers, **Jeff Wood**, Balch & Bingham LLP, spoke to students as well.



Coleman



Angelo



Wood



## COLLEGE OF LAW ALUMNI LISTSERV



The Environmental Law Program at Florida State University College of Law shares job opportunities and news about upcoming events with members of its Environmental Alumni listserv. Please email [lhatcher@law.fsu.edu](mailto:lhatcher@law.fsu.edu) to join the listserv.



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**MEMBERSHIP OPTIONS / DUES**

The Florida Bar dues structure does not provide for prorated dues; your Section dues cover the period from July 1 to June 30. Your application and check should be mailed to The Environmental and Land use Law Section, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

I AM... (check one)	MEMBERSHIP OPTION	ANNUAL DUES
	ATTORNEY – Admitted to Florida Bar	\$40
	AFFILIATE – Professionals and Faculty	\$50
	AFFILIATE – Students	\$20

I understand that all privileges accorded to members of the section are accorded affiliates and law students, except that affiliates may not advertise their status in any way, and neither affiliates nor law students may vote, or hold office in the Section or participate in the selection of Executive Council members or officers.

**CERTIFICATION:** I hereby certify that I have never been denied admission to any bar, or been the subject of any proceeding questioning my moral character, disbarred from any legal bar, convicted of a felony, expelled from any University or Law School, or investigated for fraud, misappropriation or mismanagement of funds.

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## PROPOSAL

from page 1

be incorporated in one, and should be followed by professionals in the interim.

The need to retain professionalism is particularly necessary in land use and environmental cases at DOAH. Those matters address particularly technical issues, handled by a sophisticated and specialized bar before Administrative Law Judges (ALJs) who are generally both experienced in administrative procedures and experienced in the subject before them. This differs dramatically from the general practice before general jurisdiction judges in state court.

The nature of the practice involves allocation of scarce natural or man-made resources, among parties with widely diverse, but generally heartfelt perceptions of how and why to conserve or to utilize those resources. Additionally, DOAH was established with the contradictory but praiseworthy purposes of addressing complex scientific and technical issues in a forum that accommodates *pro se* litigants. All of these factors make professional courtesy essential if the system is to work.

### The Creed

The Creed emphasizes courteous and cooperative practice. This reflects the long-held perception among judges, lawyers and the public that professionalism and public trust in our profession are in “steep decline.” This required redoubled emphasis on professionalism. Keith W. Rizzardi, *Defining Professionalism: I Know It When I See It*, FLA. B. J. 38 (July/August 2005), quoting at fn. 1 ABA Commission on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* at 7 (1986). Rizzardi noted Rule 19-1.1 of the Rules Regulating the Florida Bar:

This rule is adopted in recognition of the importance of professionalism as the ultimate hallmark of the practice of law. The purpose of this rule is to create a center to identify and enunciate non-mandatory standards of professional conduct and encourage adherence

thereto. These standards should involve aspirations higher than those required by the Rules of Professional Conduct.

*Id.*, added September 24, 1998, effective October 1, 1998 (718 So.2d 1179). Chapter 19 contains general authority and responsibilities for the Center for Professionalism. The Center’s goals, if followed, further the profession and society.

The ABA *Blueprint* attempts to define professionalism. While the concept appears nebulous, it is better defined by examples. The *Blueprint*’s first two general guidelines summarize the overall intent of professionalism:

All segments of the Bar should:

1. Prepare and develop within the profession integrity, competence, fairness, independence, courage and a devotion to the public interest.

\* \* \*

2. Resolve to abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct.

*Blueprint* at 47.

Florida’s efforts to implement this standard stem from two great men who passed away too soon: Judge Henry Latimer and Nassau (and former Walton) County Attorney David Hallman. This article focuses on one standard: What would they have done before DOAH? David was a dear friend, whose email template closed with: “Practicing law with civility is no longer just an option in Florida, it is mandatory.”

### What Makes Doah Different?

DOAH ALJ Scott Boyd discussed the genesis of DOAH in a 2013 Florida Bar Administrative Law Section Chair’s Column:

One of the goals of Florida’s innovative Administrative Procedure Act in 1974 was to allow citizens to inexpensively and simply contest agency decisions. The expansion of due process rights ushered in by *Goldberg v. Kelly* [, 397 U.S. 254 (1970)], certainly played a role in the

creation of this policy, but it is also clear that the use of the term “substantial interests” in the Act was intended to expand the availability of hearings well beyond those interests in which a hearing was constitutionally required. Recognizing that the courts would be ill-equipped to hear so many new cases, and that the formality of full judicial hearings would often be unnecessary, the Act created a new Division of Administrative Hearings (DOAH) to provide a more streamlined process while attempting to balance the values of independence and agency expertise.

S. Boyd, *From the Chair: Pro Se Protocols*, 34 FLA. BAR ADMIN. L. SECTION NEWSLETTER at 1 (April 1, 2013).

Nonetheless, Boyd reminds us that the purportedly streamlined DOAH process still requires familiarity with “the Administrative Procedure Act, the Uniform Rules, the Rules of Civil Procedure relating to discovery, and much of the Evidence Code.” *Id.* DOAH Administrative Law Judge Bram Canter explained nuances at DOAH that complicate typical application of this code for the practitioner, let alone the *pro se* litigant for whom DOAH was intended. B. Canter, *Practice Pointers for Administrative Hearings*, FLA. B. J. at 39 (Feb. 2008).

### “Be Quick, But Don’t Hurry”

First is the daunting speed of many DOAH actions. As Judge Canter points out, most hearings in DOAH are scheduled 60 to 90 days after the filing of the petition with the agency. *Id.* In fact, many statutes mandate expedited hearing upon demand by any party. *See, e.g.*, s. 163.3184(7), Fla. Stat., which forces a hearing within 30 days of demand for “expeditious resolution” of a comprehensive plan challenge, along with hard deadlines for post-hearing filings and final order by the Administrative Commission.

The prudent professional follows basketball coaching legend John Wooden’s maxim when facing the DOAH process. Wooden told his players: “Be quick, but don’t hurry.” It is necessary to expedite all discovery

*continued...*



## PROPOSAL

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in DOAH proceedings, especially so in 30 day proceedings. This requires coordination with all parties, particularly with the *pro se* party.

Regardless, one must recognize that *pro se* litigants almost certainly do not understand the rules, timelines or other requirements. It is not just professional, it is prudent to work with painstaking patience with unrepresented parties. It makes your life easier. ALJs appreciate coordination and courtesy, as opposed to steamrolling efforts.

This is an opportune time to remind practitioners of the unique nature of DOAH ALJs within the litigation process. Judge William Sherrill stated various aspects of the centralized DOAH judicial panel. ALJs are trained "on the job" in the administrative areas in which they serve. Therefore, while they might be administrative generalists, they are far more knowledgeable of the substantive issues in most cases before them than are most trial court judges who handle a wider range of matters. This results in special focus on due process and professionalism that comes from knowledge in the practice area combined with the due process requirements inherent in administrative process. *See generally*, W. Sherrill, *The Division of Administrative Hearings*, FLA. B. J. at 22 (January 2001).

The due process requirements that DOAH has featured since 1974 mean ALJs try to provide all parties with meaningful opportunities to present their cases. Practitioners before the Division should try to focus cases by stipulations to the extent practicable, and not by flurries of motions unless compelled to do so. The process simply works more efficiently if the practice is more cooperative and focused on reaching the merits. This is particularly true in truncated hearing schedules.

**"IF YOU DON'T HAVE TIME  
TO DO IT RIGHT, WHEN WILL  
YOU HAVE TIME TO DO IT  
OVER"**

Another apt quote by Coach Wooden. Here, doing it right means doing it the right way. Judge Canter makes

an invaluable point. Don't try to take advantage of more callow colleagues or *pro se* litigants in DOAH proceedings. *Canter, supra*. Judge Canter particularly notes that we should take special care in explaining what Requests for Admissions constitute and the ramifications of failure to answer.

Yet another Wooden quote applies to a practical lesson at this point: "Failure is not fatal, but failure to change might be." Professionalism and cooperation in discovery are especially key in DOAH discovery because of the nature of DOAH. Actions under ss. 120.569 and 120.57, Fla. Stat., are *de novo*. The hearing itself creates the agency action that the ALJ's recommended order and the agency's final order craft. Discovery responses, even admissions, do not bind a party as much as is true in circuit court. ALJs will generally allow changed or new issues as long as they do not generate "unfair surprise." *See, e.g., Key Biscayne Council v. DNR*, 579 So.2d 293 (Fla. 3d DCA 1991) (proposed amendment to petition allowed on first day of final hearing where opponent did not demonstrate prejudice).

In application, this standard results in continuances to allow the other side to respond. The *Key Biscayne Council* Court discussed this as a reasonable response to late amendments in chapter 120 cases. *Id. at 295*. In an expedited hearing, late amendments can create a mad scramble by the practitioner who refuses to back off of the hearing deadline. ALJs tend to allow amendments rather late in DOAH hearings, especially given the primary role of chapter 120 is to efficiently craft agency action while affording due process to all parties.

Judge Canter raises another practical issue that experienced administrative lawyers must beware. Subsection 120.57(1)(c), Fla. Stat., allows hearsay to supplement or to explain other evidence. Additionally, subsection 120.569(2)(g), Fla. Stat., authorizes admission of evidence that reasonably prudent persons would rely on in the conduct of their affairs regardless of admissibility in circuit court. An attorney who knows these statutes might be tempted to sneak in hearsay against a *pro se* litigant or to cite the statute against general litigators in DOAH proceedings.

Nonetheless, s. 120.57, bars hearsay as the sole basis of a finding unless it is admissible over objection under the Evidence Code. The careful practitioner recognizes that the subsection exists to allow more informality in DOAH, not to bypass evidentiary requirements. Further, the professional thing to do is to attempt to establish a case in straightforward compliance with the Evidence Code, using the statutory exception carefully and only to augment otherwise admissible evidence. One article emphasized the principal practical downside of reliance on statutory APA exceptions to the Evidence Code. The problem is often undisclosed until the ALJ's recommended or final order. Margaret-Ray Kemper and Mary Smallwood, *A Comparison of the APA and Circuit Court Procedures*, FLA B. J. 54 fn 12 and accompanying text (Jan. 2001), citing *SFK Management v. Unemployment Appeals Commission*, 664 So.2d 345 (Fla. 5<sup>th</sup> DCA 1995); and *Bellsouth Advertising & Publishing Corp. v. Unemployment Appeals Commission*, 654 So.2d 292 (Fla. 5<sup>th</sup> DCA 1995). Regardless, even if the ALJ allows evidence in that would not be admissible in trial courts, it will be given "the weight it deserves." Which is often precious little. *Id.*

Use of the Public Records Act, ch. 119, Fla. Stat., is another area where seasoned administrative practitioners should practice with professionalism. The author has freely used public records requests throughout his career. One way that the act differs from common practice is the act does not except attorney-client privileged communications from production. Nonetheless, agencies that are subject to ch. 119 are given a "reasonable time" to respond. This is due in part to the time necessary to determine if any production exceptions do exist. *Tribune Co. v. Cannella*, 458 So.2d 1075 (Fla. 1984). A professional attorney litigating with an agency should copy opposing agency counsel along with the custodian with public records requests, if not process the requests through agency counsel.

Likewise, agency counsel must comply with ch. 119. Unreasonable delay is deemed to be equivalent to unreasonable failure to respond. The professional agency counsel double-checks and ensures full compliance

*continued...*



## PROPOSAL

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with the statute. It is often inconvenient, sometimes vexatious. Nonetheless, Florida's Public Records Act implements our state Constitution, at Art. I., s. 24. Game playing in responses is not just unprofessional, it is unconditionally illegal. The author regularly posits compliance questions to Pat Gleason at the Office of the Attorney General, or other public records expert in that office, and Jon Kaney, counsel to the Florida First Amendment Foundation.

Professional use of the Public Records Act carries practical benefits. "Reasonable" response is necessarily fact-specific. A wide-ranging request might well elicit an objectively reasonable response that nevertheless comes too late to help a party in the

truncated schedule typical in DOAH. Cooperation is appropriate for the private party who want a useful response, as well as the agency counsel who wants to keep chapter 119 request from overwhelming staff.

Another practical benefit for the cooperative private practitioner is the impact of exclusive public records enforcement jurisdiction in circuit court. Sections 119.10, .11 and .12, Fla. Stat. A violation requires action for mandamus. DOAH has no jurisdiction. Circuit Court expedited resolution of a Ch. 119 mandamus action might still not be timely enough to meet one's DOAH deadlines.

One final act of professionalism eases the advocate's job. A prehearing stipulation is common, but not required, in DOAH. Ask for it. The stipulation is exponentially more important in DOAH than in most civil actions. The combination of expedited timeline, *de novo* proceeding, and often technical

topic makes it professional and practical to cooperate in narrowing issues as much as possible.

## Conclusion

This article attempts to show that professionalism especially supports efficient resolution of DOAH proceedings. Professionalism is welcome in any setting. Nonetheless, it facilitates the administrative case. This is good for the advocates, their clients, the ALJ, the agency, and the whole process. Clever litigators can find all sorts of ways to delay or to undermine ch. 120 proceedings, but such tactics are anathema to the Legislature's intent in 1974 and since. One final John Wooden quote applies to this entire proposal: "Be more concerned with your character than your reputation, because your character is what you really are, while your reputation is merely what others think you are." Do well by doing good.

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