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The Formulation of Florida's Administrative Procedure Act: An Address to the NAALJ Annual Conference in Orlando, Florida on October 14, 2003

By Arthur J. England, Jr.*

In 1973, men and women of good will, intellect, and a dedication to the improvement of the administration of justice came together to reshape administrative law in the State of Florida. This is the story of that adventure.

Going into the year 1973, administrative procedures in the State of Florida were governed by the 1961 State Model APA. Some years earlier, the Florida Legislature had created a Law Revision Council for the stated purpose of examining the laws of Florida to discover defects and anachronisms, and to modernize the state's laws. The Council operated like the American Law Institute, using a "Reporter" to identify existing law and recommend appropriate revisions to a group of lawyers and academicians who were expert in the subject area of the law being reviewed.

In May 1973, I was engaged by the Council to act as the Reporter for a review of Florida's Administrative Procedure Act. The chairman of the Council was University of Florida Law School Professor Harold Levinson, who taught and wrote on administrative and constitutional law. I had served as Tax Counsel to the Florida House of Representatives and as Special Counsel to the Governor of Florida, but I knew little about the nuances of administrative law.

In July 1973, the American Bar Association was holding its annual convention in New Orleans. I flew there and introduced myself to Milton Carrow, who was then the chairman of the Administrative Law Section of the ABA. I told him I wanted his assistance in finding people who might be interested in drafting the "perfect" administrative procedure act. Intrigued with the notion, he

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assembled an “ad hoc task force” of prominent administrative law scholars and practitioners who agreed to meet with me in the fall of 1973 for a weekend of brain-storming at Georgetown Law School in Washington, D.C. Among those in attendance at that gathering was Professor Hans Linde of Oregon, who later became the Chief Justice of the Oregon Supreme Court.

On the Saturday of our weekend conclave, we created several individual working groups to draft the several components of a “dream” APA. One team drafted hearing provisions, another rulemaking provisions, another judicial review provisions, and so on. On Sunday, the entire group came together as a Committee of the Whole to assemble and mesh the separate subject area provisions into a complete and cohesive APA.

By October 1973, I had put the task force’s “model” APA into the form of a draft statute for submission to the Florida Law Revision Council. Between October 1973 and March 1974, I submitted successive, improved revisions of a draft APA to the Council and, on a parallel track, was called to testify on the subject before the Administrative Law Subcommittee of the House Governmental Operations Committee of the Florida House of Representatives. Among the active and interested members of that subcommittee was a freshman member of the House of Representatives by the name of Buddy Mackay, who later was elected to Congress and then served as Florida’s Lieutenant Governor and Governor.

On March 1, 1974, I submitted to the Florida Legislature the final draft APA which had been approved by the Council. That statute, which was a major departure from the 1961 APA that had governed administrative proceedings in Florida, was adopted by the Legislature in June of 1974.

The state of the law prior to 1974 is amusingly illustrated by the following story which, I was reliably told, is 98% true. J.D. Thornton, who was not a lawyer, was made the head of one of the departments in the executive branch of Florida government. In the course of his duties, he issued an order to show cause as to why a license should not be revoked. A hearing was conducted which was attended by five people – the licensee, his wife, his attorney, Mr. Thornton, and the agency’s staff counsel. Staff counsel for the department presented the case for revocation, and the licensee’s attorney presented the case against revocation. After a brief

discourse on the issue, a vote was taken on revoking the license and the decision was made not to revoke the licensee's license, despite patently adequate grounds and more than sufficient evidence. When staff counsel later asked Mr. Thornton about the agency's decision, he was told that Mr. Thornton had agreed that revocation was appropriate but that there were not enough votes. Staff counsel was told to bring more votes with him next time.

That story may only be apocryphal, but the 1974 Legislature had assembled facts which revealed the way in which the 1961 APA in fact operated in the state. The House subcommittee had circulated a questionnaire to all state agencies, to elicit information about their experience with and their use of the 1961 APA. The responses revealed that virtually every executive branch agency in the state thought that they were excluded from the operation of the APA in whole or in part. Only 17% of all agency adjudications were indexed publicly - meaning that 83% could not be found by the public or attorneys. Only two-thirds were indexed within the agencies themselves, and only 33% were filed publicly. This data was just what the Legislature needed as an impetus to pass the newly-proposed APA.

There were several major innovations in the APA enacted by the Florida Legislature in 1974:

1. Its coverage was extended to all departments and agencies within the state, including the Governor and Lieutenant Governor in the exercise of responsibilities that did not derive directly from the Florida Constitution, and it contained an opt-in opportunity for local governments. The Act contained an "exemption process" for special situations – a provision that was later used to address special needs of the Department of Banking and the Division of Pari-Mutuel Wagering of the Department of Business Regulation.
2. The Act prescribed due process minima for Florida agencies in the form of adequate notice of agency activities, the right to a forum in which to present viewpoints and challenge the view of others on agency decision-making and rulemaking, the right to develop a record capable of judicial review, the right to locate administrative precedent and have it applied,

the right to know the factual bases and policy reasons for agency action, and the right to have an agency decision which affects a substantial interest made by a person who was *not* employed by the agency making the decision.

3. The Act provided public access to administrative precedent and policy. Prior to its enactment, there was a small and exclusive “private bar” of administrative law attorneys located in Tallahassee. These few dominated, if not controlled, the market for legal services involving state government, and they alone knew how the state’s agencies applied the law from case to case.
4. The Act expanded the opportunities for flexibility and informality in administrative processes by abolishing rigid lines between “judicial” and “legislative” decision-making and by declaring that all policies of general applicability, including personnel policies, forms, and even prison “directives,” were “rules” subject to formal rulemaking procedures. The Act authorized “model rules” which could be adopted by all agencies in lieu of adopting individual rules separately.
5. The Act allowed fact-finding in rulemaking proceedings and policy-making in the adjudication of individual cases, in order to focus administrative law processes on the substantial rights affected by agencies rather than on process labels. The value of this flexibility was later recognized when policy-making in the course of individual adjudications was accepted by the courts of Florida and given the name “incipient rulemaking.”
6. The Act both clarified the scope of judicial review and shaped the way agency decisions were reviewed by Florida’s appellate courts.

The legislative goals of the Act were translated by Florida’s new APA into features which are recognized by most states today as being standard features of administrative law. The goals, and their conceptual underpinnings, are explained in the Reporters’ Comments

to the final draft APA which, along with the proposed Act itself, has been reproduced in an Administrative Law Practice Manual published by Butterworth's which I co-authored with Harold Levinson.

The APA's focus on the *substance* of administrative law concerns, and away from labels, was reflected in the Act by comprehensive definitions of "agency action," "license," "official recognition," "person," "rule," and "record." The Act created independent hearing officers who are now called Administrative Law Judges. The Act made analytical differentiations between "adjudication" and "rulemaking."

I have a favorable personal assessment of the fruits of the 1973 adventure by those individuals in the Legislature, and on the Council, who dedicated themselves to the creation of a new climate for administrative law in Florida. I take pleasure in noting that the Act spawned the identification and reporting of administrative precedent, and brought to the fore administrative *stare decisis*. I am pleased to see that the Act has resulted in a complete compilation of administrative rules, forms, and procedures in Florida, now housed and regularly updated in the publicly-accessible Florida Administrative Code, and that the Act made a complete and immediate transition to the new world of administrative law through a provision that automatically repealed all agency rules on the date the Act was adopted unless they were re-enacted under the new APA within ninety days. I view with particular pride the Act's creation of the independent cadre of hearing officers who are now known as Administrative Law Judges.

I believe the Act inspired the 1981 revision of the Model APA and, through that model, led the way to new administrative procedure acts in several other states. I also believe that Florida case law under its APA has been influential on the national scene. Perhaps my greatest personal gratification comes from seeing the Reporters' Comments, which I authored, being treated by the courts of Florida as the Act's "legislative history." That personal reward was taken to another level when I had the unusual opportunity of relying on that legislative history in opinions of the Florida Supreme Court which I myself authored as a Justice of that Court.

As I said at the beginning, all this was possible because the stars were aligned in 1973, both as regards the political situation in Florida

and the presence of able persons who were willing to undertake the time and effort to formulate a new climate for the interaction between government and its citizens. In my opinion, the time, the place, and the circumstances created an historic moment which could rightly be considered the administrative "Camelot" in Florida.