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## How the Glitch Stole Christmas: The 1997 Amendments to the Florida Administrative Procedure Act

Stephen T. Maher  
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HOW THE GLITCH STOLE CHRISTMAS:  
THE 1997 AMENDMENTS TO THE  
FLORIDA ADMINISTRATIVE PROCEDURE ACT

*Stephen T. Maher*

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# HOW THE GLITCH STOLE CHRISTMAS: THE 1997 AMENDMENTS TO THE FLORIDA ADMINISTRATIVE PROCEDURE ACT

STEPHEN T. MAHER\*

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## I. INTRODUCTION

It is conventional wisdom among lobbyists that “glitch bills”<sup>1</sup> can be more controversial than the major legislation that preceded them. In theory, such bills are rather mundane housekeeping measures. In practice, they are a sore temptation for lobbyists whose proposals did not get adopted as part of the prior major legislation.

In 1996, the Legislature adopted a major revision<sup>2</sup> to the Florida Administrative Procedure Act (APA).<sup>3</sup> In 1997, the legislature intro-

\* Lawyer and legal educator. The author is a frequent commentator on developments relating to the Florida Administrative Procedure Act and on technology and the law issues.

1. “Glitch bills” are bills filed the year after major legislation is enacted so that mistakes made in that legislation can be corrected.

2. See Act effective Oct. 1, 1996, ch. 96-159, 1996 Fla. Laws 147 (codified in scattered sections of FLA. STAT. ch. 120 (Supp. 1996)); see also F. Scott Boyd, *Legislative Checks on Rulemaking Under Florida’s New APA*, 24 FLA. ST. U. L. REV. 309, 309 (1997). This 1996 revision was the most significant change to the APA since its adoption in 1974. See Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Survey of Major Provisions Affecting Florida Agencies*, 24 FLA. ST. U. L. REV. 283, 283 (1997).

3. FLA. STAT. ch. 120 (1997).

duced a glitch bill<sup>4</sup> to follow the major 1996 revision of the APA.<sup>5</sup> It also marked the ninth straight legislative session in which significant revisions to the APA were either seriously discussed or adopted.<sup>6</sup>

This Article reviews both the highlights of the glitch bill and the largely unsuccessful clamor for further administrative procedure reform during the past legislative session. In the process, the potential agenda for future legislative efforts will be examined. Part II discusses agency policy as it relates to rule repeals and required rule-making. Part III examines the technical revisions made to the APA by the 1997 glitch bill. Part IV discusses several proposals that were not adopted in the glitch bill. Finally, Part V concludes by explaining that the Legislature should not tinker with the APA until the effects of current changes can be assessed.

It appears that the adoption of so many changes to the APA in the 1996 session encouraged more requests for changes during the 1997 session. Only through an exercise of political will were further reforms excluded from this year's bill and, as a result, the glitch stole Christmas. However, the message from the 1997 session was clear. The drumbeat for reform will continue, and the seemingly never-ending search for further administrative procedure reform will continue to consume legislative resources. The unanswered question is, how many times will the APA have to be reformed before the Legislature can move on to more substantive concerns? Is this level of legislative activity concerning administrative procedure in proportion to the interests that the people of Florida have in administrative procedure, or the importance they would place on changing adminis-

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4. See Fla. SB 1066 (1997).

5. See Fla. S. Comm. on Gov't Reform & Oversight, SB 1066 (1997) Staff Analysis 1 (Mar. 25, 1997) (on file with comm.) [hereinafter SB 1066 Staff Analysis].

6. In 1991, to address unclear agency policies, the Legislature amended the APA to require agencies to adopt their policies as rules and to better index their orders. See Patricia A. Dore, *Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 FLA. ST. U. L. REV. 437, 439 (1991). In September 1992, the Senate Select Committee on Governmental Reform was formed to "focus on 'improving the effectiveness and efficiency of state government.'" Sally Bond Mann, *Reforming the APA: Adventures in the Labyrinth*, 22 FLA. ST. U. L. REV. 307, 317 (1994) (quoting a letter from Senator Pat Thomas, Pres. Pro Tempore, to Senator Charles William, Chair, Senate Select Committee (Sept. 14, 1993) (on file with author)). In November 1992, the House Select Committee on Agency Rules and Administrative Procedures formed to "'encourage greater citizen input' in the rulemaking process and to investigate whether agencies 'stray from legislative intent' in the promulgation and enforcement of rules." *Id.* at 309. Nothing passed in 1993 or 1994, but APA reform was the focus of much attention as many proposals to amend the APA were introduced. See Stephen T. Maher, *Getting Into the Act*, 22 FLA. ST. U. L. REV. 277, 278 (1994). In 1995, the Legislature passed a bill amending the APA, but the Governor vetoed it. See Rossi, *supra* note 2, at 287-88. In 1996, the Legislature passed a major revision of the APA, and the Governor signed it. See *id.* at 288.

trative procedure as a legislative priority? Probably not.<sup>7</sup> Why has administrative procedure taken its place with crime, education, and taxes as a perennial legislative issue? It is not because the populace is clamoring for administrative procedure reform. The answer may be that administrative procedure has become a scapegoat for political sins. Repeated attempts to revise the APA have become a substitute for more substantive action to address problems with administrative government.

#### A. Substance v. Procedure

Substantive changes tend to meet substantive opposition. Procedural changes tend not to draw the kind of quick and firm opposition that proposals to change statutes like the Growth Management Act might encounter, even though procedural changes can have substantive effects.<sup>8</sup> The substantive effects of procedural changes are harder to quantify, and therefore easier to pass over opposition, than changes to substantive law. For the same reason, the substantive benefits of procedural change may be illusory, or at least unpredictable and uneven.

Perhaps success in amending the Florida APA can be held as proof that something is being done about the problems of administrative government. However, the problems with continually amending the Act are that the Legislature may be looking in the wrong place for solutions to constituent concerns, and in the process of repeated change, it may tend to lose sight of the big picture. The big picture in administrative procedure is the preservation of the proper balance between underlying values that the Act reflects.<sup>9</sup> The big picture tends to be lost when legislators repeatedly focus on the latest reform proposals.

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7. Interest groups such as the Florida Chamber of Commerce, who espouse keen constituent interest in administrative procedure reform, assume that concern about government red tape equates to an interest in administrative procedure reform. Committee hearings held over the last several years to consider administrative law reform indicate that complaints usually concern substantive decisions made by agencies with which they disagree, not the process used to reach those decisions. See Maher, *supra* note 6, at 282; see also David Gluckman, 1994 APA Legislation: The History, the Reasons, the Results, 22 FLA. ST. U. L. REV. 345, 347 (1994) (explaining that "[t]here was a strong sense that this committee was formed to correct a number of preconceived problems, many of which either did not exist or had little to do with the APA").

8. David Gluckman has suggested that the "implementation of the Growth Management Act in the rural counties was the strongest single trigger of interest in the APA." Gluckman, *supra* note 7, at 349. I agree that substantive concerns like these have tended to drive interest in amending the APA. See Maher, *supra* note 6, at 278-79.

9. The APA reflects the chosen balance between maintaining efficiency in government and assuring that agency decisions are made fairly and accurately and are recognized as legitimate. See Stephen T. Maher, Administrative Procedure Act Amendments: The 1991 and 1992 Amendments to the Florida Administrative Procedure Act, 20 FLA. ST. U. L. REV. 367, 367 (1992).

Reform has been used very loosely in this context in the last few years. It has come to mean the latest proposal for change, not necessarily a positive improvement. Proposals made by the executive branch tend to focus on freeing the executive from the procedural requirements of the act. To them, that is reform. When the legislative branch and regulated interests talk about reform, they are usually advocating the opposite course. They are usually trying to further burden executive action with even more procedural requirements. Recent reform efforts have vacillated between these two positions.<sup>10</sup> Perhaps the most radical reform would be to allow a session or two to pass without any discussion of administrative procedure reform. That is one reform with a great deal of merit.

## II. THE 1996 AMENDMENTS

### A. Public Reaction and the Nonexistent Counterrevolution

The 1996 amendments to the APA were adopted amid much fanfare and self-congratulation.<sup>11</sup> All of the politicians involved declared victory, although the Governor did not get a significant part of what he wanted in the legislation.<sup>12</sup> The lobbyists were even happier. They had been angling to include their reforms in a major APA bill since the 1993 session, and they were much in need of something to show for their work.<sup>13</sup> The public's reaction, if there was any, was hardly noticeable. Although it may not be politically correct to note the point, few people outside Capital Circle<sup>14</sup> even understood what the terms "administrative procedure" or "administrative law" described.<sup>15</sup>

Someone just reading the notices might perceive that landmark legislation had just been enacted. For example, Professor Rossi described the 1996 legislation as evidencing a "counterrevolution" against agency rules:

In their effort to reform Florida's APA, advocates of flexibility and rationality were joined by those who fear decisionmaking by non-majoritarian bodies and by those who simply fear any attempt by

10. See Maher, *supra* note 6, at 284-87.

11. The signing ceremony was held on the steps of the old Capitol, complete with speeches and a crowd of well-wishers.

12. See discussion *infra* Part II.C.1.

13. For a brief history of these unsuccessful efforts, see Stephen T. Maher, *Five Easy Pieces on Changing the Florida APA: An Introduction to the Symposium*, 22 FLA. ST. U. L. REV. 243 (1994); see also Florida Administrative Procedure Act Symposium, 22 FLA. ST. U. L. REV. 243 (1994).

14. Capital Circle is Tallahassee's equivalent to the famous Washington Beltway, of inside and outside the Beltway fame.

15. This reflection is based upon personal experience, after telling people for over 20 years that I practice administrative law and teach administrative procedure. The most common response is "What kind of work does that involve?"

government to regulate markets. Much of the growing counter-revolution against rules has been fueled by regulated interests, such as developers and industry, who have been dissatisfied with the outcome of agency regulation.<sup>16</sup>

According to this account, the 1996 amendments represent a fledgling counterrevolution against required rulemaking fueled by regulated interests. The revolution, requiring agencies to adopt their policies as written, published rules when it was feasible and practicable to do so, was created by the 1991 amendments to the APA.

However, neither a revolution nor a counterrevolution has occurred. The 1991 amendments were not a revolution, they were a reaffirmation of the basic policy choices made in the original APA.<sup>17</sup> Legislation was necessary because the courts had lost their way in interpreting the APA's rulemaking requirements.<sup>18</sup> At first, courts interpreted the rulemaking requirements very strongly, finding that the failure to adopt policies as rules could be fatal to agency attempts to enforce those policies.<sup>19</sup> Over time, the courts softened their position, and found that the failure to promulgate agency policy as written, published rules would not necessarily render that policy invalid or unusable.<sup>20</sup> That case law reduced the ability of substantially affected persons to protect themselves from unpromulgated policy and to force agencies into rulemaking.<sup>21</sup> The 1991 amendments were a compromise that found a middle ground between those two positions, requiring rulemaking without invalidating every pol-

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16. Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Rulemaking Revolution or Counter-Revolution?* 49 ADMIN. L. REV. 345, 358 (1997).

17. See Maher, *supra* note 9, at 371. Professor Dore also shared this view. See Dore, *supra* note 6, at 437; Stephen T. Maher, Patricia Ann Dore and the Florida Administrative Procedure Act, 19 FLA. ST. U. L. REV. 951, 954 (1992). Required rulemaking furthers the original intent of the Act to "cut down on the private knowledge of the policies which shape agency decisions which is now possessed only by small groups of specialists and the agencies' staffs." See FLA. ADMIN. PRACTICE at 6 (1979) (App. C) [hereinafter PRACTICE MANUAL].

18. The APA was adopted in 1974. In 1976, the Florida Supreme Court took a strong position on the need to adopt policies as rules in *Straughn v. O'Riordan*, 338 So. 2d 832, 834 (Fla. 1976) (finding that the unpromulgated standards in that case were rules under the Act and as such were not enforceable against O'Riordan in the absence of publication in the manner required by law). The First District, apparently following this reasoning, then decided *Department of Administration v. Stevens*, 344 So. 2d 290 (Fla. 1st DCA 1977), which invalidated agency policies because they had not been adopted as rules. However, beginning with *McDonald v. Department of Banking and Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977), the First District Court began moving away from this approach, and by the time the bill that became section 120.353 was under consideration, invalidation of unpromulgated policy had become a rarity.

19. See Dore, *supra* note 6, at 437; Maher, *supra* note 9, at 373.

20. See Maher, *supra* note 9, at 373. In *McDonald v. Department of Banking and Finance*, the court excepted "incipient agency policy" from the rulemaking requirements of the Act. *McDonald*, 346 So. 2d at 581.

21. See Maher, *supra* note 9, at 374.

icy that was not promulgated.<sup>22</sup> While required rulemaking surely represented a radical departure from federal administrative law on the subject because the federal courts had given federal agencies a free hand to choose whether or not to engage in rulemaking,<sup>23</sup> required rulemaking was not a radical departure from the way the original Florida APA requirements were first interpreted.<sup>24</sup> In fact, the required rulemaking amendment adopted in 1991 represented a somewhat more moderate position than early Florida case law had established, because it did not invalidate a policy not adopted as a written, published rule as the early case law did. Instead, it just provided for a process to force adoption of the policy as a written, published rule.<sup>25</sup>

The 1996 amendments did not represent a counterrevolution against the 1991 amendments that required rulemaking. The most significant aspect of the 1996 amendments was the fact that, despite intense lobbying by the executive branch, the Legislature refused to repeal required rulemaking. This is the strongest evidence possible of the existence of any counterrevolution against required rulemaking. Yet Professor Rossi hardly mentions this fact.

I also disagree with what I understand to be Professor Rossi's position on who supported the repeal of required rulemaking. If he is suggesting, by arguing that regulated persons are supporting a counterrevolution against required rulemaking, that regulated persons are the ones who are seeking to drive agency policy out of written, published rules, I disagree. The effort to drive policy out of written rules is being spearheaded by politicians in the executive branch of government<sup>26</sup> who seek to unfetter their power over regulated interests by removing it from the requirement of rulemaking.<sup>27</sup> Logically, regulated interests should have no part in such efforts because they are clearly against their interests.

22. See *id.* at 391.

23. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 267 (1974) (holding that agencies are generally free to decide whether to proceed by rule or order).

24. The Supreme Court's decision in *Straughn v. O'Riordan*, 338 So. 2d 832 (Fla. 1976), not only took a hard line on the duty to promulgate policy as written, published rules by invalidating policy that had not been properly promulgated, it signaled that was the original intent of the Act in an interesting way. Justice England, who wrote the opinion, had been the Reporter for the draft APA before serving on the Court.

25. See FLA. STAT. § 120.535 (1995).

26. Professor Rossi agrees that the counterrevolution he describes is executive-led. See Rossi, *supra* note 2, at 288.

27. The requirement that agencies adopt their policies as written, published rules fetters agency discretion by limiting the power of agencies to act in ad hoc, inconsistent, and arbitrary ways towards regulated interests in similar factual circumstances. Rules also help fetter agency discretion because they facilitate legislative oversight of agency interpretations of their legislative mandates, because those interpretations are published as rules and are thus easily available for legislative review.



## B. Agency Policies Survive Rule Repeals

Repealing published rules does not protect regulated interests from agency policies. Agency policy can be applied against regulated interests whether or not it is written in published rules. Policy formerly in a written, published rule that has been repealed remains a rule even after the rule is repealed, so long as the policy does not change and is still enforced.<sup>28</sup> Repeal simply destroys the evidence of existing policy, making it harder for regulated interests to know and follow the law. Regulated interests stand to benefit when agencies are required to adopt their policies as written, published agency rules.<sup>29</sup> Publication makes it easier to know and to follow, or challenge, agency policy. A written rule that misinterprets a statute may easily be brought to the attention of legislators. The murkier the policy, the more difficult it is to either follow it or confront and challenge it. Published rules also bring discipline to agencies in their policymaking. To make written, published rules, they must explicitly make policy choices and state those choices with clarity.

Regulated interests in Florida want written, published rules. Not only is publication generally beneficial, for the reasons stated, but in Florida there are special reasons for insisting on the adoption of agency policy as written, published rules. Florida has the strongest rule challenge remedy in the United States.<sup>30</sup> This means that when policy is written down and published as a rule, it can be challenged, either as it is being adopted or afterwards, as an “invalid exercise of delegated legislative authority”<sup>31</sup> in specially designed rule challenge proceedings.<sup>32</sup> The rule challenge remedy was significantly strengthened by the 1996 amendments, and that was done at the behest of regulated interests.<sup>33</sup> This suggests that regulated interests want

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28. The Florida APA defines a rule functionally, so that an unpublished “agency statement of general applicability that implements, interprets, or prescribes law or policy” is, by definition, still a rule. FLA. STAT. § 120.52(15) (1997).

29. See Stephen T. Maher, *The Death of Rules: How Politics is Suffocating Florida*, 8 ST. THOMAS L. REV. 313, 331 (1996).

30. See Stephen T. Maher, *We’re No Angels: Rulemaking and Judicial Review in Florida*, 18 FLA. ST. U. L. REV. 767, 790 n.113 (1991).

31. Section 120.52(8), Florida Statutes, defines this phrase as meaning agency “action which goes beyond the powers, functions, and duties delegated by the Legislature.” It includes situations where the agency has materially failed to follow rulemaking procedures or requirements; where the agency has exceeded its grant of rulemaking authority; where the rule enlarges, modifies, or contravenes the law implemented; where the rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; where the rule is arbitrary and capricious; where the rule is not supported by competent substantial evidence; or where the rule imposes regulatory costs which could be reduced by less costly alternatives that substantially accomplish statutory objectives. See FLA. STAT. § 120.52(8) (1997).

32. See *id.* § 120.56 (establishing rule challenge procedures).

33. The rule challenge remedy was strengthened in the 1996 amendments in several ways. First, it was strengthened by allowing proposed rule challenges to be filed later in

policy adopted as written rules and support the continuation of requirements that agency policy be adopted as written, published rules. Why enhance the remedies available to challenge policy adopted as written, published rules if agencies can simply circumvent those remedies by removing their policies from the published rules?

I agree with Professor Rossi that “[m]any provisions in the 1996 reforms will make rulemaking more difficult for agencies,”<sup>34</sup> but I disagree that this “seem[s] to be at odds with the 1991 presumptive rulemaking amendment.”<sup>35</sup> Making requirements burdensome is not at odds with imposing requirements. The adoption of burdensome rulemaking requirements may or may not be viewed as desirable, but it is quite consistent with the traditional regulatory balance that has existed in the Florida APA since its adoption in 1974. Florida has traditionally had some of the most burdensome rulemaking requirements of any jurisdiction in the nation.<sup>36</sup> For good or ill, the Florida Legislature has made a deliberate policy choice to adopt such a stance because of its steadfast opposition to executive branch lawmaking and its belief that constituents need strong protection from improper and unresponsive agency rules.<sup>37</sup>

### C. The Real Problem: When the Executive Branch Ignores Required Rulemaking

The most important administrative law issue in Florida today is not the extra burden that the Legislature has placed on the rulemak-

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the rulemaking process. See *id.* § 120.56(2). Special interests had complained that while the proposed rule challenge was powerful, it was costly to use because a challenge had to be filed within 21 days of the publication of the proposed rule and before the public hearing. See *id.* § 120.54(3)(a) (1995). The 1996 amendments changed the time of filing, allowing such challenges to be filed within 10 days after the final public hearing, among other alternatives. See *id.* § 120.56(2)(a) (1997). This may save the expense of actually filing a challenge while retaining the power of the challenge, because it allows regulated interests the opportunity to threaten to file a proposed rule challenge at the public hearing if their requested changes are not made. Because the proposed rule challenge is often used as a bargaining tool, this change has increased the real power of the remedy. Second, the 1996 amendments imposed upon the agency the burden of proving that a proposed rule is not an invalid exercise of delegated legislative authority when challenged. See *id.* § 120.56(2)(a). Third, the adoption of the so-called map tack provision, which requires that agencies be able to show specific statutory rulemaking authority for the rules they adopt, promises to make rule challenges easier to win. See *id.* § 120.536(1); see, e.g., *Calder Race Course, Inc. v. Department of Bus. and Prof'l Reg.*, DOAH Case No. 96-0343RP (June 13, 1997) (finding that the fact that a proposed rule is reasonably related to an agency's duties is no longer sufficient, and striking down the proposed rule).

34. Rossi, *supra* note 2, at 304.

35. *Id.*

36. For example, I observed in 1992 that “[o]ur statutory rulemaking procedure provides more opportunities to prevent agency encroachment on legislative prerogatives than does any other administrative procedure act.” Maher, *supra* note 9, at 368.

37. See Maher, *supra* note 29, at 345.

ing process, but the impunity with which the executive branch has ignored the legislative mandate of required rulemaking. That is a development that Professor Rossi ignores and that the Legislature failed to address through legislative oversight of agencies in 1996 and in 1997. It continues today. This trend dilutes every rulemaking protection in the APA. When an agency adopts rules without promulgating them as the APA requires, no procedural protection at all is provided during rule adoption.

### 1. The Executive Branch Assault on Required Rulemaking

In the bipartisan euphoria that accompanied the signing of the 1996 amendments, people have forgotten that, just a few short years ago, administrative law reform was a legislative issue and the executive branch had no viable administrative law agenda.<sup>38</sup> What was worse, the executive branch was not even defending its own battered bureaucrats when they were, often unfairly, called on the carpet before legislative committees bent on reforming a bureaucracy some legislators saw as harming their constituents.<sup>39</sup> The executive branch could have stood up to the call for administrative procedure reform on the merits. Many of the examples used as evidence of a need for administrative procedure reform at legislative committee hearings involved substantive decisions with which legislators disagreed, and had nothing to do with administrative procedure.<sup>40</sup> The Governor chose not to get involved, and pressure on this issue continued to mount.<sup>41</sup>

Prior to the 1994 election, the momentum on this issue was clearly with the Legislature. The Governor's position that the bureaucracy needed more discretion and not tighter control<sup>42</sup> was getting nowhere in the Legislature. After almost losing the 1994 election, the Governor, an astute politician, "got religion" on this issue. The Governor's considerable political instincts, awakened on the campaign trail, told him that people needed a way, other than by voting against those in power, to vent their frustrations with the government. His agenda may have come out of Philip Howard's book,<sup>43</sup> but the Governor's counterattack was essentially a political response to growing legislative pressure on this issue. The Governor found a way to restate his longstanding position on APA issues, that

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38. See Maher, *supra* note 9, at 408-18 (criticizing the Governor's agenda and concluding that it represented no more than "a round up of the usual suspects").

39. See Gluckman, *supra* note 7, at 345-47.

40. See Maher, *supra* note 6, at 282.

41. See *id.* at 282 n.14.

42. See Maher, *supra* note 9, at 409-10.

43. See PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994).

the APA should be amended to allow bureaucrats more discretion and should not hold them in such tight control, in a manner that the Legislature and the Cabinet, that Democrats and Republicans, all seem to find irresistible. The Governor's restatement holds no analytical power. In fact, it really makes no logical sense. It does, however, sound great in a stump speech, and it has proven to be an effective political position, promising all incumbent politicians forgiveness for their sins.

The Governor's new formulation of his "more discretion, less control" position is simple: written rules are the problem.<sup>44</sup> The legislators who authorize the rules and who oversee their implementation, and the bureaucrats who write the rules and enforce them, are all blameless. Since rules are the problem, rule books can be held up and vilified. Because rule books are the problem, those books should be destroyed. Thus, since the Governor's war on rules began in 1994, Florida has seen a "bookburning" of unprecedented proportions. Literally thousands of written rules have been removed from the Florida Administrative Code, although most have not ceased to be the law in Florida.<sup>45</sup> This is true because, under Florida law, rules are defined functionally by their effect, not by what is published in the Florida Administrative Code.<sup>46</sup> Policies that continue to be followed after the published rules stating them are repealed are still nonetheless rules under the law.<sup>47</sup>

The Governor and Cabinet issued written orders requiring executive agencies to repeal fifty percent of their rules.<sup>48</sup> Executive agencies responded with a mass repeal of agency rules.<sup>49</sup>

It is easy to see why the Governor's top legislative priority of the 1996 session in the administrative law area was the repeal of section 120.535, Florida Statutes, which required the adoption of policies actually being followed by agencies, as written, published rules.<sup>50</sup> Based on anecdotal information from agency staff members with

44. The restatement of the classic excuse that "the devil made me do it" in this context is that "the rules made me do it."

45. See Maher, *supra* note 29, at 329-30, 334.

46. See FLA. STAT. § 120.52(15) (1997).

47. See *id.* Since a rule "means each statement of general applicability that implements, interprets, or prescribes law or policy," the removal of the statement from the Florida Administrative Code does not repeal the rule if the statement is still being followed.

48. See Maher, *supra* note 29, at 321-28.

49. See *id.* at 328-30; see also Rossi, *supra* note 2, at 287. It has gotten so bad that a friend who used to work in an agency and is now in private practice confided that he uses his 1994 rule book when he deals with his old agency because it more completely sets out existing agency policy than does the 1997 version.

50. See FLA. STAT. § 120.535 (1995) (requiring that "[e]ach agency statement defined as a rule under s. 120.52(16) shall be adopted by the rulemaking procedure provided by s. 120.54 as soon as feasible and practicable").

whom I have spoken, and who refuse to go on record, for years the Governor has orchestrated agency noncompliance with that requirement in the hope of winning its repeal.<sup>51</sup> Despite his best efforts, the Governor failed to win the repeal of required rulemaking. Because he has created such a staggering degree of noncompliance with required rulemaking in the hope of securing its repeal, the Governor's defeat on this issue was the most significant, if least discussed, aspect of the 1996 amendments. The Governor had to accept defeat on this issue because he did not have the votes to stop an override of his veto of the 1995 amendments, an event that was threatened, and that would have occurred, if he had not come to terms with the Legislature on a 1996 APA bill. The Legislature was in no mood to repeal required rulemaking.

The Governor's efforts to secure the repeal of section 120.535, Florida Statutes, were substantial. The Legislature's refusal to repeal the requirement was one of the chief reasons the Governor vetoed the 1995 amendments to the APA.<sup>52</sup> He then hand-picked a commission to study the issues and make recommendations to the Legislature, fully expecting his commission to back his call for a repeal of required rulemaking.<sup>53</sup> However, even his hand-picked commissioners would not vote to repeal this requirement.<sup>54</sup> The best the Governor could muster was the adoption of a rule waiver provision,<sup>55</sup> and the enactment of a simplification bill that reworded and reorganized the APA so as to disperse section 120.535, Florida Statutes, to the four corners of the APA.<sup>56</sup> Required rulemaking is still part of the APA, even though the requirement is sometimes referred to as "the former 535" because it has been sliced and diced so effectively during "simplification." This cosmetic surgery has not solved the

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51. For years the Governor's Office followed up its executive order with phone calls to agencies designed to secure their compliance with the 50% reduction quota.

52. See Veto of Fla. CS for CS for SB 536 (1995) (letter from Gov. Chiles to Sec'y of State Sandra B. Mortham, July 12, 1995) (on file with Sec'y of State, The Capitol, Tallahassee, Fla.); Maher, *supra* note 29, at 339-41; see also Governor Vetoes APA Bill, ADMIN. L. SEC. NEWSL., (Fla. Bar, Tallahassee, Fla.), Sept. 1995, at 1-3.

53. Senate Bill 536, which was vetoed by the Governor, called for a commission appointed by the Governor, the President of the Senate, and the Speaker of the House. See SB 536 (1995). The Governor's Administrative Procedure Act Revision Commission was appointed by the Governor alone.

54. See GOVERNOR'S ADMIN. PROC. ACT REVISION COMM'N, FINAL REPORT (1996).

55. See Act effective May 29, 1997, ch. 97-176, § 3, 1997 Fla. Laws 3318 (codified at FLA. STAT. § 120.542 (1997)).

56. See *id.* Section 120.535 has been dispersed to the four corners of the Act, but still remains viable, even though it is now harder to find. Parts of the old 120.535 can be found in sections 120.54(1), 120.56(1) and (4), and 120.595(4), Florida Statutes. I opposed the call to simplify the APA. See Maher, *supra* note 29, at 341-46. Given the Governor's longstanding opposition to some provisions in the APA, I have always suspected that the driving force behind "simplification" of the APA was not the desire to make it more readable. Professor Rossi notes that even after the face lift, the APA "will still rank low on the average citizen's summer reading list." Rossi, *supra* note 2, at 289.

Governor's problem. The thousands of repeals he orchestrated remain indefensible today because this requirement has not been repealed.

The Governor and Cabinet have been fortunate that, thus far, their rule repeals have not required much defense. No state officials have complained about the failure to follow the law in this regard, and no complaints are likely. Elected officials like being able to blame the rules for their own failings. Bureaucrats who disagree with the fifty percent rule repeal policy have decided that discretion is the better part of valor, and have registered their disapproval through creative rule repeal. For example, bureaucrats have consolidated several rules into one rule to meet rule repeal quotas, rather than through outright criticism or defiance.<sup>57</sup> No politicians have been confronted on this issue by the media. Indeed, the media seem completely oblivious to this problem. Private litigants have thus far not pushed the issue too hard. Additionally, the courts have recently made it more difficult to bring private challenges to the legality of rule repeals, a development that has undoubtedly brought much relief to the executive branch.<sup>58</sup>

## 2. Ten Thousand Repeals and Nowhere to Turn

In *Federation of Mobile Home Owners of Florida, Inc. v. Florida Manufactured Housing Association, Inc.*,<sup>59</sup> mobile home owners and the Florida Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (Agency) sought to repeal an agency rule that they believed had been interpreted by the First District Court of Appeal in a manner unfavorable to mobile home owners.<sup>60</sup> The rule governed the circum-

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57. One good example of this trend is the consolidation of three rule chapters into one by the Florida Housing Finance Agency. See 22 Fla. Admin. W. 2832-62 (May 10, 1996) (repealing chapters 9I-33, 9I-34, and 9I-35 and creating chapter 9I-48). This reorganization turned 46 rules into 32 rules, one with 100 subparts. The reason given for this change was not to reduce the number of rules, but, "to establish a more efficient provision of procedures" applicable to the different programs combined into one chapter. *Id.* at 2833-35.

58. The degree of relief can only be fully understood when the numbers are examined. Between January 1, 1997, and October 3, 1997, there were 1428 repeals out of a total of 3211 rule actions. In 1996, there were 3482 repeals out of a total of 7035 rule actions. In 1995, there were 5775 repeals out of a total of 10,198 rule actions. Thus, in the last several years there were more than 10,000 repeals. This represents the majority of the 19,667 repeals (out of 112,213 rule actions) from 1975 to October 3, 1997. Those repeals do not represent radical changes in the substantive law established by rule. They represent a decision by government not to follow the law, which requires most policies to be adopted in written, published rules.

59. 683 So. 2d 586 (Fla. 1st DCA 1996).

60. See *id.* at 588-89.

stances under which changes could be made to the prospectus.<sup>61</sup> The Manufactured Housing Industry Association (Association) was fighting to keep the rule in place.<sup>62</sup>

The Association challenged the repeal by filing a section 120.54(4) rule challenge against the repeal in the Division of Administrative Hearings (DOAH), and by joining that challenge with a section 120.535 challenge.<sup>63</sup> These section numbers have all changed with the adoption of the newest version of the APA in 1996, but the substance of the law has not changed.<sup>64</sup> The Association argued that the proposed rule was invalid because it was an invalid exercise of delegated authority in two respects.<sup>65</sup> First, the repeal, in trying to change the law, conflicted with court interpretations that everyone assumed had established the law in a pro-industry posture.<sup>66</sup> Second, the repeal failed to establish adequate standards for agency decisions and vested unbridled discretion in the agency.<sup>67</sup>

The court began its analysis by stating:

While section 120.52(16), Florida Statutes (1993), provides that the term "rule" "includes the amendment or repeal of a rule," there are no reported Florida decisions addressing whether that provision makes the repeal of any rule subject to rulemaking challenge, or simply entitles interested parties to seek repeal of a rule in rulemaking proceedings, and to receive notice of amendments and repeals as required by section 120.54(1), thus permitting a challenge when the repeal has the corollary effect of creating a new rule.<sup>68</sup>

The suggestion that rule repeals are not clearly rulemaking under the Act, subject to all the procedural requirements and protections of the Act, including the ability to file proposed rule challenges against repeals, is not only unprecedented, it is contrary to the plain language of the Act and to the policies that underlie the Act. The language of the Act is clear. The statutory definition of the term "rule"

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61. A prospectus is an important document that must, under chapter 723, Florida Statutes, be given to a mobile home owner when the owner moves in to a mobile home park.

62. See *Mobile Home*, 683 So. 2d at 589. As it turned out, the court found that none of the parties correctly interpreted earlier First District Court precedent. The court interpreted its own precedent not to have the pro-industry effect that everyone had assumed. See *id.* at 593. The Agency and the owners thus lost the battle (the repeal was found invalid) but won the war (the rule was not in need of repeal for them to prevail, given the court's reading of precedent). See *id.*

63. See *id.* at 588.

64. See Act effective Oct. 1, 1996, ch. 96-159, § 16, 1996 Fla. Laws 181 (amending FLA. STAT. § 120.54(4) (1995)).

65. See *Mobile Home*, 683 So. 2d at 590.

66. See *id.*

67. See *id.*

68. *Id.*

states that rule “includes the amendment or repeal of a rule.”<sup>69</sup> Also, there is clear direction, outside this definition section, that repeals are to be treated in the same procedural manner as rule adoptions. Section 120.54(3)(d)5, Florida Statutes,<sup>70</sup> states “After a rule has become effective, it may be repealed or amended only through the rulemaking procedures specified in this chapter.”<sup>71</sup>

The policy behind including repeals as rules, and treating both in the same procedural manner, is strong. An agency’s decision to repeal a rule can have as much, or more, impact on a substantially affected person than the decision to adopt a new policy. The same concerns about accuracy, acceptability, and efficiency that underlie all rulemaking are also concerns regarding the repeal of rules. There is no logical reason to limit the assurance of procedural regularity that the Act requires in rulemaking only to rule adoptions. It should be equally required in all rulemaking activity. To my knowledge, never before has anyone suggested that rule repeals do not have to be noticed, processed, and adopted in the same way as rules.<sup>72</sup> To my knowledge, for twenty-three years everyone has acted as if all rule repeals are subject to the APA in all respects.

The court continued:

To constitute “rulemaking” a rule repeal is required to satisfy independently the remainder of the definition of a “rule” in section 120.52(16): “agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency. . . .” A repeal that does not have the effect of creating or implementing a new rule or policy is not a “rule” subject to challenge.<sup>73</sup>

How can the court require a repeal to independently satisfy the requirements within the definition of a rule when the definition itself states that the term rule “includes the . . . repeal of a rule”?<sup>74</sup> The quoted analysis is clearly wrong.<sup>75</sup> The court suggests that the “includes” language might have some lesser effect than making the repeal a rule. It explains that the “includes” language “simply entitles interested parties to seek repeal of a rule in rulemaking proceedings, and to receive notice of amendments and repeals as required by section 120.54(1).”<sup>76</sup> However, this analysis gives no effect whatso-

69. FLA. STAT. § 120.52(15) (1997).

70. This section was formerly found in section 120.54(13)(b), Florida Statutes.

71. FLA. STAT. § 120.54(3)(d)5 (1997).

72. Except those rules that are, by statute, subject to a modified process.

73. *Mobile Home*, 683 So. 2d at 590-91. See FLA. STAT. § 120.52(16) (1995).

74. FLA. STAT. § 120.52(15) (Supp. 1996) (emphasis added).

75. This conclusion is further reinforced by developments during the 1997 legislative session. See discussion *infra* Part III.

76. *Mobile Home*, 683 So. 2d at 590.



ever to the “includes” language, because sections 120.54(1) and 120.54(5), Florida Statutes, (which provide the method for seeking repeal of a rule alluded to by the court) both mention repeals by name.<sup>77</sup>

Under the court’s interpretation, must repeals of this kind even go through the rulemaking process? The court has concluded that no proposed rule challenge can be brought against such rules.<sup>78</sup> Must a rulemaking hearing be held upon request? Must any other step be taken to adopt the repeal as a final rule, other than the notice required in section 120.54(1)? Not according to the court’s analysis.<sup>79</sup> The other rulemaking requirements in the APA are for rules and do not specifically mention repeals, and the court has determined that repeals of this kind are not rules.<sup>80</sup>

Thus, it appears that under the court’s interpretation of the statute, rule repeals that do not create or implement a new rule or policy are not rules and therefore cannot be reviewed by the Legislature’s Joint Administrative Procedure Committee (JAPC).<sup>81</sup> It also appears that, according to *Mobile Home*, rule repeals need not be adopted as rules after they are noticed for repeal.<sup>82</sup> Moreover, it appears rule repeals will no longer be the subject of rulemaking hearings of any kind, and cannot even be published in the Florida Administrative Code, which is reserved for adopted rules. This is a clear departure from the way rule repeals have been handled by the executive and legislative branches of government for twenty-three years.<sup>83</sup>

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77. The APA makes specific reference to “repeals” in several rulemaking contexts in the 1996 amendments. There are specific references to repeals in section 120.54(3)(a)(1) (the old 54(1)); section 120.54(3)(b)(1) (statement of estimated regulatory cost); section 120.54(3)(b)(2) (the small county, small city, and small business impact consideration); section 120.54(3)(d)5 (discussed above); and section 120.54(5) (the old 120.54(7)).

78. See *Mobile Home*, 683 So. 2d at 591 (concluding that “[a] rule repeal that does not have the effect of creating or implementing a new rule or policy is not a ‘rule’ subject to challenge”).

79. There is a good argument that “intended action” language in section 120.54(3)(c)(1) includes repeals and would require a rulemaking hearing on all repeals if requested. See FLA. STAT. § 120.54(3)(c)(1) (1997). That language comes from section 120.54(3)(a)(1), the successor to section 120.54(1), and seems to encompass both adoptions and repeals in that context. That language is repeated in section 120.54(3)(c)(1), the successor to old section 120.54(3), the section that governs rulemaking hearings. Thus, a good argument could be made that, despite the *Mobile Home* ruling, there still is a right to a rulemaking hearing in connection with all repeals. However, under the logic of *Mobile Home*, no further action would be required. See *Mobile Home*, 683 So. 2d. at 593.

80. See *Mobile Home*, 683 So. 2d. at 591.

81. The JAPC is charged with examining proposed and existing rules.

82. This is because only rules must be adopted and, according to *Mobile Home*, repeals are not rules.

83. To my knowledge, rule repeals are being handled the same way by the Secretary of State’s office and the JAPC after the *Mobile Home* decision as they were handled before the decision was announced.

If agencies should decide to follow this precedent, and notice but do not adopt certain repeals, how will the executive and legislative branches respond? The Secretary of State and the JAPC have routinely been involved in the day-to-day assurance that agencies are following the rulemaking requirements of the Act. If called upon to do so, they will find the First District Court's test a difficult one to enforce. Whether a rule repeal will, or will not, have the effect of creating or implementing a new rule or policy cannot necessarily be determined on the face of the rulemaking materials that are required by statute to be submitted with the rule repeal. The court in *Mobile Home* reached the conclusion that the repeal there had such an effect after two paragraphs of analysis with the benefit of a hearing officer's findings made after a trial.<sup>84</sup> How can the Secretary of State and the JAPC hope to determine whether an agency is properly noticing but refusing to adopt its repeal without benefit of such resources? The unworkable situation the court's construction will create is one more reason for concluding that the court's analysis is wrong.

### 3. The Result: Rule Repeals Increase

This judicial hostility towards statutory protections in rule repeals is not only illogical and unprecedented, it could not come at a worse time. One of the most distinctive features of the administrative law landscape over the past few years has been an unusually large volume of rule repeals. In 1995, for the first time since the Florida APA was adopted in 1974, the majority of rules noticed for adoption were rule repeals, not new rules.<sup>85</sup> To put that fact in clearer perspective, there were 5777 rules noticed for repeal in 1995; there had been only 8627 rule repeals during the previous twenty years.<sup>86</sup> This reversal of a twenty-year trend was no accident. Rule repeal has become a political imperative, the politician's way of demonstrating that they are tough on red tape. Both the Governor and the Cabinet have established rule repeal quotas and have worked with agencies, by letter and telephone, to make those quotas produce results.

In this respect, the rule repeal at issue in *Mobile Home* was not typical of the kinds of repeals that have been common in recent years. Most rule repeals in recent years have not sought to change the law. Rules have been repealed for political reasons, so elected officials could crow about the large number of agency rules they have repealed. These repeals are precisely the kind of repeals that *Mobile*

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84. See *Mobile Home*, 683 So. 2d at 591.

85. See Maher, *supra* note 29, at 313, 328.

86. See *id.*

Home, if followed, will insulate from challenge. Ironically, after making its analysis, the Court found that the challenger in the Mobile Home case properly challenged the repeal under section 120.54. The case hits hardest where protection is needed most—where the administrative process is being manipulated for political reasons.

One consistent legal weakness in the flood of recent rule repeals is the published explanations of why the rules are being repealed.<sup>87</sup> These statements rarely explain the real reasons for the rule's repeal. In many cases, the rules are being repealed to meet Governor- and Cabinet- imposed rule repeal quotas, but that is often not mentioned. The statements also usually fail to indicate that the policy expressed in the repealed rule will continue to remain in force as an unpublished rule. Yet that has very often been the reality. Instead, the repeals generally explain that the rule is unnecessary, or something along those lines, even though that conclusion is not legally correct. Legally, where the policy that was in the rule will still remain in effect after repeal, the law still requires that such unpromulgated rule policy be adopted as a written, published rule.<sup>88</sup> Agency reticence in this area is understandable. If an agency is repealing a rule that it intends to continue to follow as an unpublished policy and it explains that fact in its rulemaking materials, the rule repeal should be invalid on its face.

Before *Mobile Home*, I always assumed that any repeal could be successfully challenged pursuant to section 120.54(4), Florida Statutes, if the materials submitted with the repeal contained inaccurate statements concerning the reasons for the repeal. I also assumed that any appeal could be successfully challenged if accurate statements in the repeal materials showed that the agency intended to use the repeal to circumvent the APA rule adoption requirement. This included even when no change in policy was intended. This assumption was based on the language of section 120.52(8), Florida Statutes, which defines an invalid exercise of delegated legislative authority, and describes what is subject to invalidation through the Act's rule challenge remedies.<sup>89</sup> Providing inaccurate or untrue information in the rulemaking materials required by section 120.54(3)(a)4., should be considered to be a material failure to follow the Act's rulemaking procedures and a basis for invalidating a rule.<sup>90</sup> Similarly, I viewed an admission that the purpose of the rule repeal was to remove rule policy from the Florida Administrative Code so that it could be followed as an unpromulgated rule, as an admission

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87. See FLA. STAT. § 120.54(3)(a)(1) (1997). These explanations are located in the detailed written statement of the facts and circumstances justifying the proposed rule.

88. See *supra* text accompanying note 56.

89. See FLA. STAT. § 120.56(8)(a) (1997).

90. See *id.*

that the repeal was designed to circumvent established rule-making procedures.<sup>91</sup> Thus, the rule that results fails to establish adequate standards for agency decisions,<sup>92</sup> and the attempt should be struck down as arbitrary and capricious.<sup>93</sup> This is especially true when an agency admits that it is repealing a rule to meet the fifty percent repeal requirements of the Governor's executive orders.<sup>94</sup>

I still believe that challenges such as these should be permitted. However, the First District Court of Appeal will apparently not allow a proposed rule challenge in cases where the rule repeal does not create or implement a new rule or policy, even when the rulemaking materials accompanying a rule repeal are clearly false.<sup>95</sup> The Court will also apparently not allow a challenge when an agency admits in its rulemaking materials that the purpose of the repeal is to circumvent the rulemaking requirements of the Act.<sup>96</sup> These are precisely the kinds of cases where a preenforcement remedy like a proposed rule challenge is most valuable. Hopefully, one of the other district courts will hear this issue and interpret the statute in a manner that will give the Supreme Court of Florida an opportunity to straighten out the law in this area.

In *Mobile Home*, the court also reminded the bar that, in the First District Court, there can be no claim that the repeal is invalid under the theory that the non-rule policy of the agency enlarges, modifies, or contravenes the specific provisions of the law the rule was intended to implement. The court stated:

In [*Christo*], the appellant had asserted that unpromulgated agency rules were invalid under both sections 120.535 and 120.56. The hearing officer held that there was no violation of section 120.56 "because the manuals did not enlarge, modify or contravene the specific provisions of law they were intended to implement." However, this court held that "the Legislature, in enacting section 120.535, intended section 120.535 to be used as the exclusive method to challenge an agency's failure to adopt agency statements of general applicability as rules."<sup>97</sup>

91. See *id.*

92. See *id.* § 120.52(8)(d). The standards would be inadequate in the sense that the rule that results from the repeal is unwritten and thus harder to locate and apply.

93. See *id.* § 120.52(8)(e).

94. See Maher, *supra* note 29, at 337 ("The whole concept of a fifty percent repeal is more of a publicity stunt than a rational approach to reducing regulation. I believe that this uniform rule repeal quota is per se arbitrary and capricious.").

95. See *supra* text accompanying note 73.

96. See *supra* text accompanying note 78.

97. *Federation of Mobile Home Owners of Florida, Inc. v. Florida Manufactured Housing Ass'n, Inc.*, 683 So. 2d 586, 590 n.1 (Fla. 1st DCA 1996) (citations omitted) (discussing *Christo v. Florida Dep't of Banking and Fin.*, 649 So. 2d 318 (Fla. 1st DCA 1995)).

The First District Court's conclusion that the Legislature intended section 120.535, Florida Statutes, to be the exclusive method to challenge non-rule policy is certainly not the only way to read the statutes. Section 120.56 has not been effectively limited by the legislation that added section 120.535 to the APA.

While section 120.535(8) provides that “[a]ll proceedings to determine a violation of [section 120.535(1)] shall be brought pursuant to this section,” it is still not clear whether relief is also available to challenge unpromulgated rules through section 120.56. It is possible that section 120.535 is not the exclusive remedy available under the APA to respond to an unpromulgated rule. The section 120.56 rule challenge may still be available to invalidate an unpromulgated rule on the basis that it has not been adopted through the formalities of section 120.54. While the Legislature may have intended to make section 120.535 the exclusive method to deal with this problem, it has not made the legislative adjustments necessary to accomplish this result. Section 120.52(8) still defines an “[i]nvalid exercise of delegated legislative authority,” the operative language in section 120.56, to include situations where “[t]he agency has materially failed to follow the applicable rulemaking procedures set forth in s. 120.54.”<sup>98</sup>

Thus, there may be a way to read the two sections together to give effect to both.

Perhaps the section 120.56 rule challenge is still available to invalidate unpromulgated rules, subject to the defense that the challenged policy is not a rule, but rather an incipient policy. Thus, even if section 120.56 has vitality in this area, it has a very narrow reach. Section 120.535 may have a broader reach as it is available against all agency policy, even incipient policy.<sup>99</sup>

Such a distinction harmonizes the sections, giving effect to both and leaving the section 120.56 remedy strong but narrow and the section 120.535 remedy broad but weak.<sup>100</sup>

This reading is consistent with the intent of the 1991 amendments that added section 120.535. That legislation was enacted to force recalcitrant agencies into rulemaking, not to give them a new way to avoid being forced to follow legal requirements.<sup>101</sup> Agencies that still rely on unpromulgated but fixed agency rules should know better by now, and should have that policy invalidated. In recent years, agencies have intentionally been creating unpromulgated but

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98. Maher, *supra* note 9, at 399-400.

99. *Id.* at 400-401.

100. The remedy is weak because rather than invalidate policy, it merely forces the agency to initiate rulemaking or cease reliance on the policy.

101. See Dore, *supra* note 6, at 439.

fixed agency rules through massive rule repeals.<sup>102</sup> Being thrown into the section 120.535 briar patch is hardly a punishment that agencies will fear enough to think twice when they are told by the Governor and the Cabinet to remove the evidence of established rules from the Florida Administrative Code in order to create some impressive statistics for a campaign speech.

The level of repeal that the politicians have sought to achieve—repeal of fifty percent of agency rules—cuts deep into the heart of established rule policy, except in those agencies that have been grossly negligent in keeping their published rules up to date. Newer volumes of the Florida Administrative Code fail to include many rules that still exist in practice. The mass repeals have created policy icebergs, with large amounts of established rule policy unknown to all but agency staff and agency insiders, ready to sink passing constituents without warning.<sup>103</sup> Ironically, this is the same situation that existed when the APA was adopted in the 1970s,<sup>104</sup> the situation that motivated the very rulemaking provisions that the First District Court has been interpreting as providing no help against this political assault. The Governor and the Cabinet are happy with the results. Apparently a great campaign speech is worth this price.

Both the *Mobile Home* and the *Christo* cases limit the challenges that can be brought against rule repeals and the unpromulgated rule policy that results from the kind of repeals that have occurred on a weekly basis over the last few years. The real world consequences of these decisions will be to provide some degree of insulation from challenge for agencies who ignore the Act's rulemaking requirements. These consequences could have been foreseen, had the court paid closer attention to the political climate in Tallahassee. Both decisions were handed down in the midst of the politically motivated rule repeals that they now serve to protect. The courts are the bulwark against the executive branch's refusal to follow the legislative mandate embodied in the APA. They must serve as the protector of the administrative process when it is being manipulated for political reasons. When they fail to provide such protection, the integrity of the process is threatened, and the people are left without an effective remedy.

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102. See Maher, *supra* note 29, at 331.

103. See *id.* at 334. While it is hard to know how much unpublished rule policy is now in existence, the fact that more than 10,000 rules have been repealed since January 1, 1995, many, if not most, for political reasons unrelated to policy change, suggests that a huge volume of unpublished rule policy now exists.

104. "The proposed act will cut down on the private knowledge of the policies which shape agency decisions which is now possessed only by small groups of specialists and the agencies' staffs." PRACTICE MANUAL, *supra* note 17, at 6.

### III. THE GLITCH THAT STOLE CHRISTMAS

Senator Charles Williams,<sup>105</sup> the sponsor of the 1996 legislation and the member most responsible for the final form of the bill, promised in 1996 that the only APA legislation that would be considered in 1997 would be a true glitch bill.<sup>106</sup> He expressed support for the concept that the 1996 legislation should be given time to work before it was subject to still further amendment.<sup>107</sup> Although many changes were suggested for inclusion in the bill, Senator Williams held the line and a glitch bill was passed that was remarkably true to its name.<sup>108</sup> The amendments added many technical revisions. Some are noteworthy.

#### A. Notice Requirements and Negotiated Rulemaking

Section 120.54, Florida Statutes,<sup>109</sup> no longer requires a notice of rule development when a rule is being repealed "because there is no need to have rule development for a rule that already is developed and that is being repealed."<sup>110</sup> The Staff Analysis noted, however, an intent to leave other procedural protections during repeals in place.<sup>111</sup> The repeal still has to be noticed under section 120.54(3), Florida Statutes, however, and full opportunity to have public hearings on the wisdom of the repeal or to challenge the legality of repeal of the rule will arise at that time.<sup>112</sup> Thus, the Legislature has apparently rejected, at least in this more informal way, the Court's analysis in *Mobile Home*, and has agreed that rule challenges should be available during repeals.

The requirement that a preliminary text of the proposed rules be contained in the rule development notice if one is available has also been modified.<sup>113</sup> The statute now provides an alternative procedure that allows the agency to state how a person can obtain a preliminary draft without cost, if one is available.<sup>114</sup> This change was a concession made because "[a]gencies indicated that there is a high cost associated with printing a preliminary draft that is likely to undergo many changes."<sup>115</sup>

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105. Dem., Live Oak.

106. Senator Williams made remarks to this effect both during and after the passage of the legislation that gave rise to the glitch bill.

107. See *id.*

108. See Act effective May 30, 1997, ch. 97-176, §§ 1-18, 1997 Fla. Laws 3313 (codified in scattered sections of FLA. STAT. ch. 120 (1997)).

109. FLA. STAT. § 120.54 (1997).

110. SB 1066 Staff Analysis, *supra* note 5, at 8.

111. See *id.*

112. See FLA. STAT. § 120.54(3) (1997).

113. See *id.*

114. See *id.*

115. SB 1066 Staff Analysis, *supra* note 5, at 8.

The Legislature also amended the Act to assure that agency choices made during negotiated rulemaking are not immediately reviewable.<sup>116</sup> The change clarifies that an “agency’s decision to use negotiated rulemaking, its selection of representative groups, and approval or denial of an application to participate in the negotiated rulemaking process are not agency action.”<sup>117</sup> The right to challenge the proposed rule that emerges from the process is preserved.<sup>118</sup>

### B. Waiver and Variance

The Legislature added a number of changes to the waiver and variance provision added in 1996 “to clarify that an agency is authorized to limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant, but only to the extent necessary for the purpose of the underlying statute to be achieved.”<sup>119</sup> The statute provides for the publication of the disposition of petitions in the Florida Administrative Weekly, which will make it easier to follow the waivers and variances being granted and denied by agencies on a weekly basis.<sup>120</sup>

The 1996 statute permitted the Administration Commission to adopt uniform procedural rules governing the grant or denial of emergency and temporary variances and waivers.<sup>121</sup> The new law requires the adoption of such rules and adds the power to adopt rules for revocation of a waiver or variance.<sup>122</sup> The new law also authorizes expedited time frames, waiver of limited public notice, and limited comments on a petition for emergency or temporary variances and waivers.<sup>123</sup> The new law also requires an agency to review a petition and request additional information within thirty days.<sup>124</sup>

### C. Summary Hearing Procedures

The new law provides that the “original parties,” rather than the DOAH administrative law judge, have the power to decide whether a case shall proceed in accordance with the summary hearing process.<sup>125</sup> This is troubling because the summary hearing process may

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116. See Act effective May 30, 1997, ch. 97-176, § 3, 1997 Fla. Laws 3319 (codified at FLA. STAT. § 120.54(2)(3) (1997)).

117. FLA. STAT. § 120.54(2)(3) (1997).

118. See *id.*

119. SB 1066 Staff Analysis, *supra* note 5, at 10.

120. See FLA. STAT. § 120.542(8) (1997); SB 1066 Staff Analysis, *supra* note 5, at 11.

121. See FLA. STAT. § 120.542(3) (Supp. 1996).

122. See *id.* § 120.542(3) (1997).

123. See *id.*

124. See *id.* § 120.542(7).

125. See *id.* § 120.574(1)(c).



be used collusively to prevent effective participation by intervenors. I warned about this danger years ago.

For example, if this kind of simplified process were used in a controversial matter where the real dispute was between the parties and a possible intervenor, could the parties to the proceedings agree to invoke the simplified process to permit no discovery and expedite the case to shut out potential intervenors, or to make it more difficult for intervenors to participate effectively?<sup>126</sup>

By removing the administrative law judge, the only check on such abuse from the process, the amendment invites such abuse.

#### D. Stay as of Right

The new law made changes to the “stay as of right” provision of the APA, one of the most important protections that the APA contains for licensed businesses and professionals.<sup>127</sup> This provision guarantees a stay as of right upon filing a notice or petition for judicial review of an agency decision if a business or professional license is suspended or revoked.<sup>128</sup> This section of the statute was added more than twenty years ago in recognition of the fact that administrative agencies make mistakes, and that it would be a serious mistake to impose career-ending or career-threatening discipline on most business and professional people until a court has the opportunity to review the proceedings for fairness and correctness.<sup>129</sup> The statute provides a limited exception for the worst cases, a provision that allows the denial of a stay where the licensee presents a danger to the health, safety, or welfare of the public.<sup>130</sup>

##### 1. The 1996 Amendments and Substantive Stay as of Right Changes

In 1995, I wrote an article that criticized the Department of Business and Professional Regulation (Department) for failing to follow the section as it had been interpreted by the courts and calling on the courts to provide better guidance in this area.<sup>131</sup> My criticisms focused on the procedures the Department used to handle stay requests.

In 1996, the first stage of the general overhaul of the APA included the preparation of a simplified APA which, according to all

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126. Maher, *supra* note 6, at 303.

127. See SB 1066 Staff Analysis, *supra* note 5, at 13.

128. See FLA. STAT. § 120.68(3) (1997).

129. See *What's Wrong With the Stay As of Right*, ADMIN. L. SEC. NEWSL., (Fla. Bar, Tallahassee, Fla.), June 1995, at 2.

130. See FLA. STAT. § 120.68(3) (1997).

131. See Maher, *supra* note 129, at 2.

representations and agreements, would not change the substance of the APA but would merely simplify its language.<sup>132</sup> Unbeknownst to all but a few representatives of the Department, the simplification bill was drafted to change the substance of the stay as of right section to address the problems I had identified in my article. Section 120.68(3) was changed by amending it to conform with the way that the Department was handling stay requests.<sup>133</sup> No debate occurred concerning the change, although it is of great importance to all licensed business and professional people in the state.<sup>134</sup> It is fair to assume that the legislators who voted in favor of the bill that contained this change did not even know this change was being made.

These events came to light as the glitch bill was being considered. At a meeting conducted by the Governor's office to determine what should be proposed for inclusion in the glitch bill, the assembled group discovered that these substantive changes had been made to the simplification bill. This revelation occurred when representatives of the courts came to inquire why section 120.68(3), Florida Statutes, had been changed and a representative of the Department admitted making substantive changes to the simplification bill. Once the truth about how the change was made came to light, the argument was made that a reversal of this change should be included in the glitch bill. It was indeed a mistake to have allowed the simplification bill to be used to make substantive changes contrary to all representations and agreements made about the simplification process. Despite opposition from those who sought to retain the change, the glitch bill returned the stay as of right provision to the way it read before the 1996 amendment.<sup>135</sup> The provision now reads:

The filing of the petition does not itself stay enforcement of the agency decision, but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state. The agency may also grant a stay upon appropriate terms, but, whether or not the action has the effect of suspending or revoking a license, a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas. In any event

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132. See APA Review Commission, ADMIN. L. SEC. NEWSL., (Fla. Bar, Tallahassee, Fla.), Dec. 1995, at 5-6. This revision process was a two-step process by general agreement. Step one was simplification and reorganization of the Act to make it more user friendly. Step two was the addition of substantive changes. I was a critic of this process. See The Governor's Proposed Technical APA Revision, ADMIN. L. SEC. NEWSL., (Fla. Bar, Tallahassee, Fla.), Dec. 1995, at 1-3.

133. See FLA. STAT. § 120.68(3) (1995).

134. No debate occurred because everyone assumed that the simplification process made no substantive changes to the APA.

135. See SB 1066 Staff Analysis, *supra* note 5, at 13.

the court shall specify the conditions, if any, upon which the stay or supersedeas is granted.<sup>136</sup>

Despite this clear language, its legislative history, and case law interpreting this section over the last twenty years, there are still important unanswered questions concerning key aspects of the stay as of right, and there are disagreements about how those questions should be answered. Whether and how the stay as of right provision should be amended is likely to be debated in the 1998 legislative session.

## 2. Suspension and Revocation

While many stays during judicial review are simply agreed to by the agency, when contests over stays occur they are important to both the licensee and the regulating agency. Proper construction and application of the stay as of right provision is critical because livelihood is usually at stake when it is applicable. Many licensees are professionals and businesses who depend upon licensure to earn their living. Any interruption of a professional practice or licensed business operation can have significant adverse consequences. Professionals usually have ongoing responsibilities that can be disrupted even by several days of suspension. Licensed businesses that are not able to operate may see their customers go elsewhere, and it may be difficult to rebuild customer loyalty after an interruption in service or product sales. Both a successful professional practice and a successful licensed business are hard to build and can be seriously harmed or even destroyed by temporary license suspensions.

This observation is not meant to denigrate the importance of policing professionals and licensed businesses. It merely recognizes the nature of the interests being policed. Mistakes can be made in the administrative disciplinary process, and the existence of a stay as of right seems to recognize the importance of affording a professional or licensed business judicial review of agency action before suspension or revocation is actually imposed.

The Legislature's cautious approach to imposing suspension and revocation is consistent with a recognition that business people and skilled professionals practicing in Florida are an important state resource and that it usually takes years of training and experience for an individual to build the skills necessary to succeed in business and to practice a profession. If the disciplinary process is not sensitive to the realities of business and professional practice, irreparable harm

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136. FLA. STAT. § 120.68(3) (1997).

may be done to innocent businesses and professional practices even before the court reaches a final decision in a case.<sup>137</sup>

The APA did not always contain a stay as a matter of right provision. The stay as a matter of right language was added to the APA by chapter 76-131, Florida Laws.<sup>138</sup> The Reporter's Comments, the original legislative history of the APA, and the Reporter's Final Draft (the draft statute) contained no special treatment for stays of license suspensions or revocations during judicial review.<sup>139</sup> The draft statutes simply provided that: "The filing of a petition for review does not itself stay enforcement of the agency action. The agency may grant, or the reviewing court may order, a stay upon appropriate terms."<sup>140</sup> That language was similar to the language actually adopted in 1974: "The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms."<sup>141</sup> The provision, as adopted, was taken from the 1961 Revised Model State Act.<sup>142</sup>

The 1976 amendment added the special treatment for stays of license suspensions and revocations that is now in place.<sup>143</sup> That chapter added the stay "as a matter of right" language now in section 120.68(3).<sup>144</sup> The available legislative history of this chapter provides no indication why the stay as a matter of right provision was added at that time. However, the amendment clearly manifests an intent to create a special system, and a special standard, for issuing stays in the case of license suspensions or revocations that is different from the one applicable in other situations. Strong public policy reasons support the issuance of stays in the case of suspensions and revoca-

137. See ARTHUR EARL BONFIELD & MICHAEL ASIMOW, *STATE AND FEDERAL ADMINISTRATIVE LAW* 718 (1989) ("If the court refuses a stay, the damage to the petitioner may be irreparable; even if the petitioner ultimately wins on the merits, it may be too late.").

138. Act effective June 15, 1976, ch. 76-131, § 13, 1976 Fla. Laws 230 (amending FLA. STAT. § 120.68(3) (1975)).

139. See PRACTICE MANUAL, *supra* note 17; see also, FLA. ADMIN. PRACTICE Reporter's Final Draft, at 7 (1995).

140. FLA. ADMIN. PRACTICE Reporter's Final Draft, at 7 (1995).

141. FLA. STAT. § 120.68(3) (1974).

142. See FRANK E. COOPER, 2 *STATE ADMINISTRATIVE LAW* 627 (1965).

143. See FLA. STAT. § 120.68(3) (1997), providing:

(3) The filing of the petition does not itself stay enforcement of the agency decision, but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state. The agency may also grant a stay upon appropriate terms, but, whether or not the action has the effect of suspending or revoking a license, a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas.

144. See *id.*

tions pending judicial review, except in cases where an immediate danger to health and safety is presented.<sup>145</sup>

The 1976 amendment made clear that while licensees facing suspension or revocation after completing the administrative process would not be granted an automatic stay of that discipline, they would be eligible to apply for what the courts have come to call a stay as a matter of right.<sup>146</sup> What exactly does this mean? The language of the provision itself sets out a few points. It indicates that an application for stay would be required (because the stay is not automatic), but “supersedeas shall be granted as a matter of right,” with the reasons for denying such a stay limited to those stated in the statute.<sup>147</sup> The amendment places the burden on the agency to “petition” the “court” to deny the stay, and to demonstrate that supersedeas would constitute a “probable” danger to “the health, safety or welfare of the state.”<sup>148</sup> Existing language, providing that the agency may grant, or the reviewing court may order, a stay, was retained.<sup>149</sup>

That existing language was the subject of the next amendment to section 120.68(3), which occurred in 1978. The 1978 amendment amended the last sentence of the 1976 provision:

The agency may also grant, ~~or the reviewing court may order,~~ a stay upon appropriate terms, but, whether or not the action has the effect of suspending or revoking a license, a petition to the agency for a stay shall not be a prerequisite to a petition to the court for supersedeas. In any event, the order shall specify the conditions, if any, upon which the stay or supersedeas is granted.<sup>150</sup>

This change was accompanied by a Senate Staff Analysis and Economic Impact Statement from the Governmental Operations Committee that explained that this change: “Provides that an affected party may petition a court for supersedeas to stay enforcement of final agency action without having first petitioned the agency for a stay.”<sup>151</sup>

While the legislative materials do not explain why this change was made at this particular time, the case law does suggest a reason why this matter was clarified during the 1978 legislative session. On September 27, 1977, the Fourth District Court denied a motion to

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145. See Cooper, *supra* note 142, at 628.

146. See Act effective June 16, 1976, ch. 76-131, § 13, 1976 Fla. Laws 230 (amending FLA. STAT. § 120.68(3) (1975)).

147. *Id.*

148. *Id.*

149. See *id.*

150. Act effective June 27, 1978, ch. 78-425, § 11, 1978 Fla. Laws 1418 (amending FLA. STAT. § 120.68(3) (1977)).

151. Fla. S. Govtl. Ops. Comm., SB 860 (1978) Staff Analysis 1 (Apr. 24, 1978) (available at Fla. Dep’t of State, Div. Of Archives, ser. 18, carton 511, Tallahassee, Fla.).

stay of a final order made pursuant to section 120.68(3), Florida Statutes, without prejudice to apply to the agency for a stay.<sup>152</sup> The court's rationale was that "[t]he statute authorizes either the respondent or this court to enter such a stay."<sup>153</sup> The court indicated its preference for the agency to be the one to first hear the stay motion.<sup>154</sup> This was the very statutory language changed by the 1978 amendment. This combination of events suggested that the Legislature was sending a clear message to the courts to hear stay motions under section 120.68(3) without first requiring application to the agency for a stay.

Nevertheless, the First District Court of Appeal recently refused to follow this mandate.<sup>155</sup> In an administrative appeal governed by section 120.68, the court denied a Motion for Supersedeas and Stay filed in the court because the stay request was not first made to the agency.<sup>156</sup> The court recognized the language of section 120.68(3), but nevertheless decided that "in most cases we shall continue to adhere to the general requirement of [Florida Rule of Appellate Procedure] 9.310(a) that an applicant should first seek relief in the lower tribunal."<sup>157</sup> The court's rationale for this deviation from the statute, was that:

[b]y doing so, this court will continue to serve in its primary function as a court of review. The lower tribunal is in a superior position to determine whether a bond or other conditions should be required before an order is stayed and, if so, the amount of the bond or the nature of the conditions. These determinations may require fact finding which is not a function of this court.<sup>158</sup>

First, this rationale is of uncertain validity. Given the differences between court practice and administrative practice, the legislatively mandated special treatment of stays in administrative appeals is understandable. In court practice, the lower tribunal is a court, not a party litigant. In administrative practice, the lower tribunal is the same administrative agency that is opposing the issuance of a stay. Permitting direct access to the appellate court in such a case makes perfect sense.

Second, this approach often wastes valuable time. Indeed, that was the case in *MSQ Properties v. Florida Department of Health and*

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152. See *Trombley v. Florida Real Est. Comm'n*, 356 So. 2d 813, 813 (Fla. 4th DCA 1977).

153. *Id.*

154. See *id.*

155. See *MSQ Properties v. Florida Dep't of HRS*, 626 So. 2d 292, 293 (Fla. 1st DCA 1993).

156. See *id.*

157. *Id.*

158. *Id.* This is essentially the same rationale used by the Fourth District Court in *Trombley*, the case that the 1978 amendment appears to have been adopted to overrule.

Rehabilitative Services.<sup>159</sup> MSQ followed the court's direction and applied to the agency for a stay.<sup>160</sup> The agency denied the stay.<sup>161</sup> The court then heard MSQ's motion to review the agency's stay decision and granted it, entering a stay in an unpublished order.<sup>162</sup> Such delay may well leave licensed individuals out of work for weeks while the matter is considered by the agency, denied, and then reviewed by the court.

Third, the First District Court has no authority to ignore this statutory requirement allowing direct access.<sup>163</sup> The appellate rule relied upon by the court is not in conflict with the statute. The rule specifically recognizes that it can be modified by "general law."<sup>164</sup> It has been so modified in administrative appeals governed by the APA pursuant to section 120.68(3), Florida Statutes. The Legislature has made the law clear on this point. The First District Court has failed to follow it.

Fourth, the problems created by an MSQ Properties approach are especially serious if this precedent is applied in cases involving a stay as of right. MSQ Properties was not a stay as of right case. It involved a bid dispute.<sup>165</sup> However, the decision itself does not make that distinction. If MSQ Properties is applied to stay as of right cases, who will do the fact finding on the "probable danger" showing required by statute? The Legislature clearly assigned that role to the courts.<sup>166</sup> The statute states that the agency must petition the court to deny a stay.<sup>167</sup> The statute gives the agency no power to deny a stay as of right based upon concerns about the public health, safety, or welfare.<sup>168</sup> Does the agency even have the authority to deny a stay? Or does that section limit the agency's authority to oppose a stay to submitting a petition to the court which sets forth its opposition?

The 1978 amendment, which reduces the agency to a "may also grant" role in the issuance of a stay, confirms the agency's limited

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159. 634 So. 2d 286 (Fla. 1st DCA 1994) (reviewing the agency's denial of MSQ's motion for stay).

160. See *id.* at 287.

161. See *id.*

162. See *id.*

163. See FLA. STAT. § 120.68(3) (1997).

164. FLA. R. APP. P. 9.310(a) ("Except as provided by general law . . . a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief.").

165. See MSQ Properties, 634 So. 2d at 287.

166. See FLA. STAT. § 120.68(3) (1997) ("[U]nless the court . . . determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state.").

167. See *id.*

168. See *id.*

role in the stay process and strengthens the argument that the Legislature intended the court to take the primary role in granting a stay during judicial review of an administrative matter. The First District Court's observation that it is institutionally not equipped for that primary role because it is not equipped to do fact finding does raise concerns, but those concerns do not justify ignoring the legislative mandate.

It is important to note the essence of the court's concern. Court involvement is made more difficult by the type of decision to be made. Stay decisions may involve contested facts and factual disputes require evidentiary proceedings. The facts decided in the final order under review may or may not alone be enough to show a probable danger to the health, safety, and welfare of the state.<sup>169</sup> If the agency plans to rely on "additional facts showing in what manner the violations demonstrate an immediate danger to the public,"<sup>170</sup> in order to oppose a stay, shouldn't those additional facts be found the same way the other facts in the case have been found, through hearing, testing, and evaluating evidence? While it has been recognized that "[t]he statute clearly places the onus on the agency to present to the court sufficient documentation to overcome the stay as of right provision,"<sup>171</sup> the courts have been less than clear exactly what this "documentation" must be. Logically, it must be an evidentiary presentation, either through the facts found below or through some additional evidentiary proceeding, and the MSQ Properties decision, for all its other flaws, seems to recognize this.

Second, this potential need for additional fact finding does not pose an insurmountable procedural obstacle to court involvement. The problem posed by fact finding can be overcome, in stay as of right cases, by allowing the appellant the opportunity to apply directly to the court for supersedeas and stay, and by allowing the agency opposing a stay to immediately petition the court not to grant a stay.<sup>172</sup> This honors both the stay as of right and petition to the court language of the statute. It could better protect those with meritorious claims for judicial review from interim interruption of their practice or business while the question of probable danger is litigated, first before the agency and then before the court. The court might guarantee this by entering a stay pending a resolution of the

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169. See discussion *supra* Part III.D.1.

170. *Old Timers Restaurant and Lounge, Inc. v. Florida Dep't of Bus. Reg.*, 483 So. 2d 463, 464-65 (Fla. 1st DCA 1986).

171. *Iturralde v. Florida Dep't of Prof. Reg.*, 482 So. 2d 375, 376 (Fla. 1st DCA 1985).

172. This seems to be the procedure approved by the First District Court. See *id.* at 376. Assuming MSQ Properties is distinguishable because it does not deal with the stay as of right situation, it is arguably the controlling procedural authority on stay as of right cases today.



agency's petition, especially if some additional evidentiary presentation is required.

### 3. Suggested Formula to Determine Whether Evidentiary Proceedings Are Necessary

Procedurally, the court could use the following formula for evaluating whether evidentiary proceedings are necessary in connection with a stay motion. If the matters alleged by the agency in its petition, if proven, would not be sufficient to deny the stay, the petition could simply be denied without evidentiary proceedings. If the matters alleged would be sufficient if proven, and are factually contested, then the court could remand the matter to the agency for proceedings pursuant to section 120.57(1), Florida Statutes, to resolve the contested factual issues. This would normally allow a DOAH administrative law judge to hear the stay dispute and to enter a recommended order to the agency finding the facts and making recommendations on the legal ruling. The neutral hearing officer would be more equivalent to a "lower tribunal" in civil cases than would the agency acting without DOAH assistance. Section 120.68(7)(a), Florida Statutes, is not exactly on point, but could serve as authority and as a model for such a remand.

What must an agency prove to overcome a stay as of right? There is surprisingly little case law available to answer this question. The case law does tell us that where a medical doctor's license was revoked for numerous findings of "acts of malpractice" in the order under review, the First District Court found a basis for denying a stay as of right based upon danger to health, safety, and welfare.<sup>173</sup> On the other hand, when an agency tried to use *Iturrallade v. Department of Professional Regulation*<sup>174</sup> to simply rely on the final order under review to oppose a stay, the First District Court refused to allow such a response.<sup>175</sup> First, the court reiterated that the agency must petition for denial of a stay, not just wait to respond.<sup>176</sup> Second, the court explained that, while there may be cases, like *Iturrallade*, this is not the usual situation.

*Iturrallade* does not hold that the mere recitation of the violations for which a licensee has been found guilty will always show a danger to the health, safety or welfare of the public. While there may be times, such as certain cases involving medical malpractice, when the findings of guilt will suffice, such is not always the case. To hold otherwise would permit denial of the stay in every in-

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173. See *Iturrallade*, 482 So. 2d at 376.

174. 482 So. 2d 375 (Fla. 1st DCA 1985).

175. See *Old Timers*, 483 So. 2d at 464.

176. See *id.*

stance, effectively nullifying the stay provision of section 120.68(3).<sup>177</sup>

The violations found in the order under review in *Old Timers Restaurant and Lounge, Inc., v. Department of Business Regulation*<sup>178</sup> were far less threatening to the public than the ones found in *Iturrade*. In *Old Timers*, the agency found problems with the way the business was organized and represented to the agency, and with a shortage of chairs in the dining room.<sup>179</sup> However, there remains a large uncharted territory between numerous acts of malpractice and too few chairs in the dining room that needs to be discussed by the courts in published opinions.

It is clear that in some cases the final order under review may justify denial of a stay, and in others it may not, but the logic that should be used to reason the outcomes of the stay as of right cases that fall in between *Iturrade* and *Old Timers* has not been clearly set out. The statute provides some guidance. It suggests that the agency must show more than that the continued licensure provides the opportunity, or the possibility, for wrongdoing.<sup>180</sup> The statute clearly states that the danger must be “probable.”<sup>181</sup>

How does the agency prove probability? By showing that the order under review found serious wrongdoing? One problem with this approach is that every final order that is the subject of a motion for stay as of right contains findings of serious wrongdoing. Only those license holders found guilty of the most serious wrongdoing<sup>182</sup> are even entitled to apply for the stay as of right guaranteed by section 120.68(3).<sup>183</sup> The Legislature’s provision for a stay as a matter of right in section 120.68(3) would be rendered meaningless if all an agency had to do to defeat the stay was to show that the order under review found serious wrongdoing. If the stay as of right is to have meaning, some other standard than “serious wrongdoing” must be used.

In the absence of clear direction from the courts, it appears from the statute that what an agency should be required to prove is future dangerousness to have a stay as of right denied.<sup>184</sup> This may be quite difficult to prove based upon one, or even more than one, instance of wrongdoing. Agencies may be tempted to argue that what the appel-

177. *Id.*

178. 483 So. 2d. 463 (Fla. 1st DCA 1986).

179. *See id.* at 464.

180. *See* FLA. STAT. § 120.68(3) (1997).

181. *Id.*

182. That is, wrongdoing resulting in suspension or revocation, rather than lesser discipline like probation or a fine.

183. *See* *Hunt v. Department of Prof. Reg.*, 558 So. 2d 156, 156 (Fla. 1st DCA 1990) (finding the automatic stay provision inapplicable to probation).

184. *See* FLA. STAT. § 120.68(3) (1997).

lant did, as proven in the administrative proceedings below, shows that he is a person of bad character, and that he poses a danger to the health, safety, or welfare of the state because he will probably act in conformity with his bad character in the future.

The argument that an individual has a bad character and can be expected to act in conformity with that bad character in the future should not be permitted because it is an improper use of character evidence.<sup>185</sup> Character evidence offered in this context is used for an improper purpose that goes beyond any improper purpose for which it could be offered in a civil trial. It is used here to argue not that the individual has acted in conformity with his bad character on a particular occasion, but that he probably will do so at some time in the future. This is not only an improper use of character evidence, it is speculative and of questionable probative value. That kind of evidence should not be permitted to determine the future of a licensed professional or business person.

The stay as of right may provide the best chance for obtaining a stay during judicial review, but it is not the only one. While seeking relief from the circuit courts seems unlikely to bring much success,<sup>186</sup> arguing to the district court that constitutional grounds exist for granting a stay, if the facts of the case support such an argument, is particularly appropriate because those issues are beyond the competence of the agency to decide and can be presented to the court for decision during judicial review.<sup>187</sup>

After almost twenty years of practice under section 120.68(3), serious unanswered questions about the procedure and substance of the section remain. Perhaps this is true because agencies rarely contest stays pending review in cases involving the suspension or revocation of a license. If courts are denying stays in unpublished orders, they should share their rationale with the practicing bar so that when lawyers are representing clients facing what is often the most serious problem of their professional career, they can proceed with speed and accuracy to obtain the interim relief necessary to make judicial review truly meaningful.

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185. See *id.* § 90.404(1) (explaining “evidence of a person’s character or a trait of character is inadmissible to prove action in conformity with it on a particular occasion [except in the case of the exceptions enumerated in that section, none of which are applicable here]”).

186. Application to circuit courts for injunctive relief in such circumstances has been disapproved. See *Department of Bus. Reg. v. Carl & Mike*, 425 So. 2d 190, 191 (Fla. 3d DCA 1983). Attempts to use circuit court receiverships to, in effect, stay a license revocation have also been criticized. See *Department of Bus. Reg. v. Garcia*, 446 So. 2d 167, 169 (Fla. 2d DCA 1984).

187. See *Carl & Mike*, 425 So. 2d at 191 (holding that the appellant was not precluded from raising appropriate constitutional challenges “before this court and in the corresponding application for stay”).

#### IV. THE UNDELIVERED GIFTS

Several proposals for change were not adopted in the glitch bill, but may appear on the legislative agenda next year.

##### A. Reducing Section 120.57(2) to Writing

One proposal included in the Governor's working group's draft of proposed glitches was a proposed amendment of section 120.57(2), Florida Statutes.<sup>188</sup> This proposed amendment would have changed the title to delete the characterization of those proceedings as hearings and instead designate them as proceedings.<sup>189</sup> Further, this proposal would amend the subsection describing what can be done at the hearing to add the sentence: "The agency shall determine whether evidence to be admitted shall be oral or written."<sup>190</sup> This proposal would have affected proceedings where substantial interests were being affected by agencies and no material facts were at issue.

This proposal would have allowed the agency to determine whether or not substantially affected persons would be allowed to have an oral hearing where no facts are in dispute.<sup>191</sup> The proposal would also have allowed the agency to dispense with oral hearings at the option of the agency.<sup>192</sup> The proposed amendment would have required no standards for when an oral hearing could be refused, and would thus seem to allow no review of that determination.

This proposal is quite disturbing. First, this change would create the anomalous position that, in cases when no facts were at issue, affected persons would have more procedural rights in rule adoption proceedings than they would in cases where an agency took direct action against them. Section 120.54(3)(c)(1) guarantees an opportunity to present evidence and argument on all issues in rulemaking, including an opportunity to present live testimony through a public hearing.<sup>193</sup> The proposed change would allow an agency complete discretion to deny such a presentation where the person's substantial interests were individually affected. This situation is out of harmony with the balance struck in every administrative procedure act of which I am aware. All provide more protection of regulated interests in adjudication than in rulemaking.

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188. See FLA. STAT. ch. 120 (Tentative Draft No. 6, 1997) [hereinafter Draft].

189. See *id.* at 25.

190. *Id.*

191. See *id.*

192. See *id.*

193. See FLA. STAT. § 120.54(3)(c)(1) (1997); *Balino v. Department of HRS.*, 362 So. 2d 21, 24-25 (Fla. 1st DCA 1978).

Second, this change ignores the reality of section 120.57(2). Section 120.57(2) proceedings are sometimes selected erroneously by unrepresented individuals who do not understand the process.<sup>194</sup> The case law that has developed in this area assures that where a factual issue appears in the course of a section 120.57(2) proceeding, the agency must suspend the proceeding and convene a section 120.57(1) proceeding.<sup>195</sup> However, the chances of a factual issue coming out in a section 120.57(2) proceeding are much reduced if no hearing is held and the substantially affected person's participation is reduced to writing. Thus, some cases that should be heard in section 120.57(1) proceedings would escape those protections if the proposed change is made. In addition, unrepresented individuals are likely to be less articulate in writing than they are in person,<sup>196</sup> and are likely to be less responsive to the real concerns of the agency or board if they are simply writing a statement rather than responding orally to questions. All these factors create a disadvantage for persons who are relegated to a written presentation.

It is hard to come up with a good reason for limiting presentations in this way.<sup>197</sup> This proposed change cannot be advanced as a change that is in keeping with the overall tone of the APA, because that tone is to provide more process than is available in other states, not less.<sup>198</sup> Certainly such hearings have been held by agencies for more than twenty years, and no agency has yet gone bankrupt from the cost. Indeed, complaints about the cost of 120.57(2) were not raised during the many hearings on what is wrong with the APA held by the Legislature over the last several years.

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194. Section 120.57(2), Florida Statutes, is the proper remedy where no material questions of fact exist. Where material facts are in dispute, a section 120.57(1) proceeding should be convened.

195. See *Mixon v. Department of State*, 686 So. 2d 755, 755 (Fla. 1st DCA 1997) (explaining that a section 120.57(1) hearing should be convened if, during a section 120.57(2) proceeding, it becomes apparent that there are material facts in dispute); see also *Dixon v. Florida Elections Comm'n*, 681 So. 2d 877 (Fla. 1st DCA 1996); *Iazzo v. Department of Prof'l Regulation*, 630 So. 2d 583 (Fla. 1st DCA 1994).

196. See *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). The court did not relegate the participants to written submissions, but instead required what has become known as welfare fair hearings.

197. The only explanation for the proposal that I have found states:

The working group felt that parts of s. 120.569 were not in total harmony with the concept of informal proceedings under s. 120.57(2). This can be corrected by substituting "proceeding" for "hearing" throughout the section and in the title of s. 120.57(2). A clarification of agencies' discretion to accept either written or oral evidence in informal proceedings is also offered.

Legislature Considers APA Glitch Bill, ADMIN. L. SEC. NEWSLETTER, (Fla. Bar, Tallahassee, Fla.), Apr., 1997, at 10. I do not find the characterization of this change as a correction to be either fair or accurate, given either the history or purpose of this section.

198. See Maher, *supra* note 6, at 293. ("The 1981 MSAPA . . . provides much less protection for constituent interests from agency encroachment than the present Florida APA.")

The 1997 amendments did include an amendment to section 120.57(2) that is relevant to this discussion. The amendment states that an agency shall “[g]ive parties or their counsel the option, at a convenient time and place, opportunity to present to the agency or hearing officer written or oral evidence.”<sup>199</sup> The Senate staff analysis is silent as to the reason for this change.<sup>200</sup> It might be a reaffirmation that the choice of written or oral presentation is at the option of either party, thus clarifying the current law that an oral hearing opportunity cannot be denied by the agency over opposition from the substantially affected person. However, there is no clear indication of the rationale for this change.

### B. The Draw Out Revisited

Another proposed glitch was to amend the draw out provision<sup>201</sup> to change the way that it must be requested and to provide that the nature of the proceeding is a recordmaking proceeding that does not result in a recommended or final order.<sup>202</sup> Since the 1996 amendments did not address the draw out in a substantive way, it is very difficult to see how this proposal would be considered to be a glitch.

The draw out is presently available during rulemaking when “a person timely asserts that the person’s substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding does not provide adequate opportunity to protect those interests.”<sup>203</sup> If the agency determines that the rulemaking proceeding is not adequate to protect the person’s interests, section 120.54(3)(c)(2) provides that it shall suspend the rulemaking proceeding and convene a separate proceeding under the provisions of sections 120.569 and 120.57.<sup>204</sup> Upon conclusion of the separate proceeding, the rulemaking proceeding resumes.<sup>205</sup>

The draw out is unique to Florida.<sup>206</sup> It has been the subject of interesting law review commentary<sup>207</sup> but unfortunately agencies have

199. FLA. STAT. § 102.57(2)(a)(2) (1997).

200. See SB 1066 Staff Analysis, *supra* note 5, at 11.

201. See FLA. STAT. § 120.54(3)(c)(2) (1997). For a brief history and description of the draw out, see Maher, *supra* note 30, at 780-84.

202. See Draft, *supra* note 188, at 11-12.

203. FLA. STAT. § 120.54(3)(c)(2) (1997).

204. See *id.*

205. See *id.*

206. See, e.g., Patricia A. Dore, Access to Florida Administrative Proceedings, 13 FLA. ST. U. L. REV. 967, 1006 (1986).

207. See Patricia A. Dore, Seventh Administrative Law Conference Agenda and Report, 18 FLA. ST. U. L. REV. 703, 727-32 (1991); Maher, *supra* note 30, at 780-92, 805-11, 834-53; Stephen T. Maher, Rulemaking in Florida: An Opportunity for Reflection, FLA. B.J., Jan. 1990, at 48, 48-50.

been generally unwilling to allow the draw out to be invoked and the courts have not given the proceeding very strong support.<sup>208</sup>

The draw out should be understood to require a full section 120.57(1) hearing conducted by DOAH that would result in a recommended order to the agency making findings of fact on the contested factual issues in the rulemaking. Furthermore, as a remedy, these findings should be binding on the agency the same way that findings made by DOAH in an adjudication would be binding. The point of the remedy is to limit agency discretion to find facts in rulemaking, and that is why agencies almost never allow it to be invoked.<sup>209</sup> Not everyone agrees with this analysis, and the remedy is so rarely invoked or litigated that there are no real definitive answers concerning how the remedy is to be conducted.

As I look back over the last twenty-two years of administrative practice, the most valuable contribution of the draw out has been to force agencies to be generous in the manner that they conduct rulemaking hearings. The agencies fear that if they are less than generous in the way they permit participation, a party whose presentation was limited will invoke the draw out. Indeed, that is just what Professor Dore predicted: "As a practical matter, an agency will be more inclined to transform the information gathering hearing to accommodate specifically requested and adequately supported procedural protections than it will be to grant a request for an adjudicatory hearing."<sup>210</sup> This role has become even more important because the Legislature made it very difficult to appeal directly due to the adoption of the rule in 1992.<sup>211</sup>

The proposed change conforms the statute to the understanding that others have of the way it should operate and encourages agencies to use the remedy because, as amended, there will be no chance that it will be interpreted to limit agency discretion. I oppose the proposed change because I believe that it is not consistent with the intent of the Act, which created a draw out to bring the adjudicatory process set out in the Act to bear in the rulemaking process. Furthermore, if the remedy is weakened to make it more acceptable to

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208. See *Balino v. Department of HRS*, 362 So. 2d 21, 25-26 (Fla. 1st DCA 1978); Maher, *supra* note 30, at 811 n.195 ("All the reported appellate decisions discussing the draw out concern the agency's refusal to convene draw out proceedings . . ."). I have been a persistent critic of the way the courts have responded to draw out requests, but Professor Dore was generally supportive of the limiting construction given to the provision by the courts. See *id.* at 809-10.

209. See Maher, *supra* note 30, at 805 n.173 ("Agency reluctance to grant a draw out is traceable to its reluctance to share control over factfinding with DOAH and its reluctance to provide the detailed explanations the draw out may require.").

210. Dore, *supra* note 206, at 1008.

211. See FLA. STAT. § 120.543 (1997). For the history of this amendment, see Maher, *supra* note 9, at 430-35.

agencies, that weakening will remove the incentive agencies now have to allow fuller presentations during regular rulemaking hearings. Finally, the proposed change may not cause agencies to use the amended draw out any more than they used the original version. There will probably be debate on this issue next session.

### C. Another Proposal on the Stay as of Right

Representatives of the Department of Business Regulation advanced a proposed amendment to section 120.60(5), Florida Statutes, that would have added the following sentence at the end of the section:

All final orders entered pursuant to this section shall include a finding as to whether the continued practice by the licensee pending appeal presents a probable danger to the health, safety and welfare of the public and shall state with particularity the basis for the agency's finding.<sup>212</sup>

This section was advanced in an effort to save the changes made to the stay as of right provision in 1996 from being removed and the provision returned to its 1995 language.<sup>213</sup>

The proposed provision is objectionable because it will reduce such findings to a boilerplate and will tend to make the finding of danger to the public routine. In the last twenty-two years, such findings have been rare. When licensing boards are called upon to make such a finding at the same time they impose suspensions and revocations, they may be reluctant to find that while such severe discipline is warranted, no danger to the public is present. Yet this type of finding was always intended to be rare. If every case resulted in such a finding, no stay as of right would be granted.

On the positive side, the requirement of such a finding would place the matter at issue from the beginning of a section 120.57(1) proceeding. It would require evidence on this issue to be presented to a DOAH administrative law judge (assuming that the agency contended the licensee was a danger and he contested this fact; it would then be a material issue of fact) and a finding of fact on the issue to be made at DOAH. These would all be positive developments.

Those licensees who select section 120.57(2) proceedings may be at a disadvantage under such a system because their cases are not heard by DOAH. Perhaps a section 120.57(1) hearing right would be triggered even in section 120.57(2) hearings if a finding of a danger to the public is made over objection, because that would create a material fact issue. However, that is not clear, and any future draft

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212. Draft, *supra* note 188, at 34.

213. See discussion *supra* Part III.D.1.



should address such concerns if advocates of this position continue to press it next session.

#### V. CONCLUSION

The most radical reform in the administrative law area next session would be to have no APA bill and no further reforms. The Legislature should wait to see how the many changes made in 1996 are working before it continues tinkering with the APA. It is too early to assess the impact of those substantial changes on agencies and on the constituents whose substantial interests are affected by them. The Legislature should study the effect of the 1996 changes and see whether the changes have the desired effect before it begins making even more changes to the APA.