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Seventh Administrative Law Conference Agenda and Report

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SEVENTH ADMINISTRATIVE LAW CONFERENCE AGENDA AND REPORT

PATRICIA A. DORE*

I. INTRODUCTION

THE Seventh Administrative Law Conference, sponsored by the Administrative Law Section of The Florida Bar, was held on March 16 and 17, 1990, in Tallahassee. The main focus of the Conference was on rulemaking procedures and whether Florida's rulemaking procedures are more complex than necessary to protect the public from arbitrary action by government agencies.

Participants met in plenary session to hear presentations from Professors Arthur Bonfield, Johnny Burris, Harold Levinson and Stephan Maher. Articles based on their remarks appear elsewhere in this issue. Before the plenary session adjourned and participants reported to their assigned small groups, I commented on the need to reform the economic impact statement requirement and on two bills then pending in the Legislature which were relevant to the topics under discussion. I then provided an agenda to focus the small group discussions and to organize the small group leaders' reports to the Conference.

This Article expands on my substantive remarks about economic impact statements and on the legislation that was pending at the time of the Conference. It concludes with a report on the small groups' responses to the agenda presented to them.

II. ECONOMIC IMPACT STATEMENTS

As originally enacted in 1974, chapter 120 contained no mention of economic impact. During the 1975 legislative session, however, section 120.54(1) was amended to require a summary of the economic impact on all persons affected by any proposed rule as part of an agency's notice of intent to adopt a rule. Agencies were permitted to determine that a summary of economic impact was not possible, and, if that

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determination were made, a statement of the reasons for the determination was to be included in the notice.¹

In 1976, the Legislature revisited the economic impact question. Agency notices of intent to adopt a rule were still required to contain a summary of the economic impact of the proposed rule on all persons affected by it, but agencies were no longer able to determine that estimating economic impact was not possible.² In addition, the Legislature required the preparation of an economic impact statement "using professionally accepted methodology, with quantification of data to the extent practicable, giving effect to both short-term and long-term consequences."³ Economic impact statements were required to contain specific information with respect to seven areas identified by the Legislature.⁴

Agency compliance with the economic impact statement requirement was doomed from the beginning. What started out as a laudable attempt to make agencies articulate and thus think about the economic consequences of regulatory choices, became instead an unattainable mandate. In the first place, the requirement was vastly overbroad. All agency proposed rules, both procedural and substantive, were covered. Anything an agency chose to do by rulemaking—adopt new policy by rule, amend existing rules, or repeal antiquated rules—was subject to the economic impact statement requirement. But perhaps the most demoralizing factor was that the Legislature made no effort to fund the employment of people with the education and experience to prepare professional economic impact statements. Faced with this impossible situation, agencies did the best they could with what they had knowing full well that neither was enough. After *De-*

1. Ch. 75-191, § 3, 1975 Fla. Laws 368, 370.

2. Ch. 76-276, § 1, 1976 Fla. Laws 750, 750.

3. *Id.* 1976 Fla. Laws at 751 (codified at FLA. STAT. § 120.54(2)(a) (Supp. 1976)).

4. The following information was required:

1. A description of the action proposed, the purpose for taking the action, the legal authority for the action and the plan for implementing such action.

2. A determination of the least-cost method for achieving the stated purpose.

3. A comparison of the cost-benefit relation of the action to nonaction.

4. A determination whether the action represents the most efficient allocation of public and private resources.

5. A determination of the effect of the action on competition.

6. A conclusion as to the economic impact of the proposed agency action on preserving an open market for employment.

7. A conclusion as to the economic impact upon all persons directly affected by the action, including an analysis containing a description as to which persons will bear the costs of the action and which persons will benefit directly and indirectly from the action.

Id. (codified at FLA. STAT. § 120.54(2)(a)1-7 (Supp. 1976)).

partment of Environmental Regulation v. Leon County,⁵ however, even this approach became untenable. In that case the court ruled that agency failure to provide an economic impact statement or to provide a correct economic impact statement constituted an invalid exercise of delegated legislative authority. The practical effect of this decision was to make every rule proposed by every agency vulnerable to a successful validity challenge under section 120.54(4). Attacking proposed rules for inadequate economic impact statements quickly became an unfair sport akin to shooting fish in a barrel.

Agencies sought relief from the Legislature during the 1978 session and they were partially successful. The economic impact statement requirement still applied to all agencies and to the adoption, amendment, or repeal of all rules, but the "professionally accepted methodology" language was repealed and the required information was pared down from seven to four items.⁶ In addition, adopted rules were protected from challenge for inadequate economic impact statements unless the challenge was brought within one year of the rule's effective date.⁷

Before the effectiveness of the legislative relief could be measured, the courts relaxed the outcome determinative rule announced in *Leon County*. In a series of cases decided in 1979, the courts characterized the required preparation of an economic impact statement as a *procedural* aspect of rulemaking.⁸ Judicial review of agency procedural errors is governed by a harmless error standard.⁹ Thus, even when an agency commits a procedural error, relief is unavailable unless the er-

5. 344 So. 2d 297 (Fla. 1st DCA 1977).

6. Ch. 78-425, § 2, 1978 Fla. Laws 1408, 1411 (codified at FLA. STAT. § 120.54(2)(a)1-4 (Supp. 1978)). The information required in the economic impact statement was:

1. An estimate of the cost to the agency of the implementation of the proposed action, including the estimated amount of paperwork;
2. An estimate of the cost or the economic benefit to all persons directly affected by the proposed action;
3. An estimate of the impact of the proposed action on competition and the open market for employment, if applicable, and
4. A detailed statement of the data and method used in making each of the above estimates.

An estimate of the impact on small and minority businesses was added in 1985. Ch. 85-102, § 7, 1985 Fla. Laws 627, 634 (codified at FLA. STAT. § 120.54(2)(b)1-5 (1985)).

7. *Id.* at 1411 (codified at FLA. STAT. § 120.54(2)(c)).

8. *Florida-Texas Freight, Inc. v. Hawkins*, 379 So. 2d 944 (Fla. 1979); *Polk v. School Bd. of Polk County*, 373 So. 2d 960 (Fla. 2d DCA 1979); *School Bd. of Broward County v. Gramith*, 375 So. 2d 340 (Fla. 1st DCA 1979).

9. Section 120.68(8), Florida Statutes, provides in relevant part that: "[t]he court shall remand the case for further agency action if it finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure."

ror causes an unfair or incorrect decision. The practical effect of these decisions was to replace the old rule which heavily favored challengers with a new one which heavily favored agencies. In fact, there have been only fourteen reported judicial decisions since 1979 that have discussed the inadequacy of economic impact statements. Agencies have prevailed in eleven cases;¹⁰ challengers have prevailed in three.¹¹

So at this point the statute demands the preparation of an economic impact statement by every agency for every rule proposed. The courts, however, excuse agency failure to comply with the statutory mandate unless failure results in an unfair or incorrect decision. As a result, agencies try only halfheartedly to comply with the statute and legitimate legislative goals are frustrated. It seems to me the time has come to introduce some measure of rationality into the economic impact statement requirement. This means forcing the Legislature to face the mess it has created. It never made any sense to require an economic impact statement for all proposed rules. To continue that requirement in the face of the judicial treatment of it compounds the problem.

I think it is time to consider a different approach to economic impact statements borrowed from the 1981 Model State Administrative Procedure Act.¹² That Act requires some level of concern about economic impact to be expressed by a specified governmental entity or a substantial number of people before preparation of a regulatory analysis is undertaken.¹³ For discussion purposes, I proposed that the Con-

10. HUMHOSCO, Inc. v. Department of HRS, 476 So. 2d 258, 262 (Fla. 1st DCA 1985); Department of Nat. Resources v. Sailfish Club of Fla., Inc., 473 So. 2d 261, 265 (Fla. 1st DCA 1985), *rev. denied*, 484 So. 2d 9 (Fla. 1986); Florida Waterworks Ass'n. v. Florida Pub. Serv. Comm'n, 473 So. 2d 237, 247 (Fla. 1st DCA 1985), *rev. denied*, 486 So. 2d 596 (Fla. 1986); Publix Supermarkets, Inc. v. Florida Comm'n on Human Relations, 470 So. 2d 754, 757 (Fla. 1st DCA 1985); Humana, Inc. v. Department of HRS, 469 So. 2d 889, 890 (Fla. 1st DCA 1985); Health Care & Retirement Corp. of America v. Department of HRS, 463 So. 2d 1175, 1178 (Fla. 1st DCA 1984); Department of Prof. Reg. v. Durrani, 455 So. 2d 515, 519 (Fla. 1st DCA 1984); Brewster Phosphates v. Department of Env'tl. Reg., 444 So. 2d 483, 487 (Fla. 1st DCA 1984), *rev. denied*, 450 So. 2d 485 (Fla. 1984); Department of Ins. v. Insurance Servs. Office, 434 So. 2d 908, 929-930 (Fla. 1st DCA 1983), *rev. denied*, 444 So. 2d 416 (Fla. 1984); Plantation Residents' Ass'n v. School Bd. of Broward County, 424 So. 2d 879, 881 (Fla. 1st DCA 1982), *rev. denied*, 436 So. 2d 100 (Fla. 1983); Cortese v. School Bd. of Palm Beach County, 425 So. 2d 554, 558 n.12 (Fla. 4th DCA 1982), *rev. denied*, 436 So. 2d 98 (Fla. 1983).

11. Department of HRS v. Wright, 439 So. 2d 937 (Fla. 1st DCA 1983); Division of Workers' Compensation v. McKee, 413 So. 2d 805 (Fla. 1st DCA 1982); Department of HRS v. Framat Realty, Inc., 407 So. 2d 238, 242 (Fla. 1st DCA 1981).

12. MODEL STATE ADMINST. PROCEDURE ACT of 1981, 15 U.L.A. 38 (1990) [hereinafter 1981 MODEL ACT].

13. The 1981 MODEL ACT states:

An agency shall issue a regulatory analysis of a proposed rule if, within [20] days after the published notice of proposed rule adoption, a written request for the analysis is filed in the office of the [secretary of state] by [the administrative rules review com-

ference consider recommending a change to section 120.54 that would require preparation of an economic impact statement only if the Joint Administrative Procedures Committee¹⁴ or some significant number of people—50, 100, 300—requested it. If the Legislature is serious about requiring agencies to consider the “interplay between social and economic factors,”¹⁵ and if the Legislature wants “to ensure a comprehensive and accurate analysis of economic factors in this calculus”¹⁶ then it seems to me those goals are better achieved by a statutory scheme that requires the calculus to be done only when economic considerations are indeed a legitimate concern. To require the exercise routinely mocks both the importance of the undertaking and the seriousness of the Legislature’s purpose.

III. PENDING LEGISLATIVE PROPOSALS

There were two major bills pending in the Legislature at the time of the Conference. Both bills were still in committee; it was appropriate to focus attention on them so that participant reactions to their details could be communicated to the legislative committees. One bill was pending in the House Governmental Operations Committee,¹⁷ and the other bill was pending in the Senate Governmental Operations Committee.¹⁸ Neither bill had a companion in the other house. The House bill addressed an area quite relevant to the rulemaking focus of the Conference. It proposed imposing restrictions on the use of the adjudicatory process for the development of policy that should be adopted as rules through the rulemaking process. The Senate bill tackled the problems of subject matter indexing and availability of agency final orders. While the Senate bill did not relate directly to agency rulemaking, there was nevertheless an inevitable connection. If agencies can develop policy through adjudication, it is essential that there be meaningful access to those final orders so that the policy can be discovered and known.

mittee, the governor, a political subdivision, an agency, or [300] persons signing the request]. The [secretary of state] shall immediately forward to the agency a certified copy of the filed request.

Id. at § 3-105(a).

14. Ch. 74-310, § 2, 1974 Fla. Laws 972 first enacted section 11.60, Florida Statutes, which creates the Joint Administrative Procedures Committee. The Committee is composed of six persons—three members of the House of Representatives appointed by the Speaker of the House, and three members of the Senate appointed by the President of the Senate.

15. Florida-Texas Freight Inc. v. Hawkins, 379 So. 2d 944, 946 (Fla. 1979).

16. *Id.*

17. Fla. HB 2539 (1990).

18. Fla. S. Comm. on Govtl. Ops., PCB 90-6 (1990).

A. *Restricting Policy Development Through Adjudication*

When chapter 120 was revised in 1974, a complex rulemaking process was put in place. Notice of intent to adopt a proposed rule has to be given wide circulation.¹⁹ People who will be affected by a proposed rule if it is adopted must be allowed an opportunity at a public hearing to inform the agency about the effects of the rule and to argue for changes they want.²⁰ In some circumstances, the public hearing may take on some or all of the procedures usually associated with adjudicatory proceedings.²¹ In addition, a proposed rule's validity may be challenged by any person who will be substantially affected if the proposed rule is adopted.²² An agency may not adopt a proposed rule until the issues raised in the validity challenge proceeding have been resolved in the agency's favor.²³ Each proposed rule must be accompanied by an economic impact statement.²⁴ An agency must also consider a proposed rule's effect on small businesses, and make an effort to reduce the proposed rule's impact on small businesses.²⁵ The Small and Minority Business Advocate, Minority Business Enterprise Assistance Office, and the Department of Commerce's Division of Economic Development must be given an opportunity to urge the agency to consider alternatives to reduce the impact of the proposed rule on small businesses.²⁶ If the agency does not accept all the alternatives proposed, the agency must submit a detailed written explanation to the Joint Administrative Procedures Committee (JAPC) explaining why the alternatives were not accepted.²⁷ The JAPC reviews almost all proposed rules serving in its capacity "[a]s a legislative check on legislatively created authority."²⁸

When one considers all the attention the Legislature has given to the rulemaking process and all the opportunities it has given to people who will be affected by proposed rules, as well as those opportunities it has given to small and minority business advocates and to itself acting through the JAPC, to hold agencies accountable for the policy contained in their proposed rules, it is simply not credible to believe the Legislature did not intend agencies to avail themselves of this dif-

19. FLA. STAT. § 120.54(1) (1989).

20. *Id.* § 120.54(3)(a).

21. *Id.* § 120.54(17). *See also* subsection C of section IV, *infra*.

22. *Id.* § 120.54(4).

23. *Id.* § 120.54(4)(c).

24. *Id.* § 120.54(2)(b).

25. *Id.* § 120.54(2)(a).

26. *Id.* § 120.54(3)(b)(1).

27. *Id.* § 120.54(3)(b)(3).

28. *Id.* § 120.545(1). *See also* subsection E of section IV, *infra*.

ficult process when formulating policy. Nor is it credible that the Legislature intended to leave to agency discretion the question whether policy should be adopted as rules, especially considering how difficult it is to run the gauntlet of section 120.54 rulemaking procedures. But nowhere in chapter 120 did the Legislature require agencies to adopt policy as rules after rulemaking accountability procedures were survived.²⁹ The Legislature's failure to write that simple command into the statute left the door open for the courts to interpret the meaning of this legislative silence.

Initially, the courts took the position that an agency policy statement of general applicability that had not been adopted as a rule through rulemaking procedures could be declared invalid in a section 120.56 rule validity challenge proceeding.³⁰ Thus, any agency policy statements which were intended by their own effect "to create certain rights and adversely affect others"³¹ were vulnerable to attack if they were not adopted following rulemaking procedures. The effect was an unambiguous judicial message: make rules of policy statements or lose the ability to use them.

Almost immediately, an exception was recognized. In *McDonald v. Department of Banking and Finance*,³² the court said that only those policy statements which were generally applicable had to be adopted as rules in order to be used. Chapter 120, it was said, "recognizes the inevitability and desirability of refining incipient agency policy through adjudication of individual cases."³³ In the opinion, the court referred to the policy that could be developed through adjudication as incipient, emerging, or nonrule policy. Incipient, emerging, nonrule policy had to be available for use or otherwise policy development would be stifled. As the court explained:

The APA does not chill the open development of policy by forbidding all utterance of it except within the strict rulemaking process of Section 120.54. Agencies will hardly be encouraged to structure their discretion progressively by vague standards, then definite standards, then broad principles, then rules if they cannot record and communicate emerging policy in those forms without

29. Before the 1974 revision, section 120.031(1), Florida Statutes, stated expressly that "[o]nly rules adopted by an agency in the manner and form provided in part I shall be valid or effective. . . ."

30. *Department of Admin. v. Stevens*, 344 So. 2d 290 (Fla. 1st DCA 1977).

31. *Id.* at 296.

32. 346 So. 2d 569 (Fla. 1st DCA 1977).

33. *Id.* at 581.

offending Section 120.54. The folly of imposing rulemaking procedures on all statements of incipient policy is evident.³⁴

Thus, *McDonald* granted agencies a limited dispensation from the rigors of rulemaking to allow agency policy to mature. This maturation was to occur over a period of time through case by case adjudication. Incipient, emerging, nonrule policy could be used by agencies to support decisions in individual cases, but only at a cost. The policy must be supported by evidence in the record and the policy is subject to challenge by a party. The record evidence must be sufficient to convince a hearing officer and ultimately a reviewing court that the policy has merit. A final order which relies on incipient, emerging, nonrule policy must fully explain that policy. "The final order must display the agency's rationale. It must address countervailing arguments developed in the record and urged by a hearing officer's recommended findings and conclusions . . . or by proposed findings submitted to the agency by a party."³⁵ It was thought that this burden of exposition would encourage rulemaking once the policy was known and settled and the agency was prepared to apply the policy generally. Were it otherwise, *McDonald* warned, "prescribed rulemaking procedures . . . [would] be atrophied by nonuse."³⁶

Cases decided since *McDonald*, however, have broadened its limited dispensation from rulemaking to include policy statements that are not in fact incipient or emerging, but rather are generally applicable. In *Florida Cities Water Company v. Florida Public Service Commission*,³⁷ for example, the Florida Supreme Court characterized a newly announced change of policy as "incipient" policy even though "[a]t oral argument the Commission's counsel conceded that this new policy would be uniformly applied in all future cases. . . ."³⁸ And the court went on to note that "[a]dministrative agencies are not required to institute rulemaking procedures each time a new policy is developed, although that form of proceeding is preferable where established industry-wide policy is being altered."³⁹ *Florida Cities Water* has been read as meaning that agencies may choose whether to adopt policy through rulemaking or proceed to develop policy—whether in-

34. *Id.* at 580.

35. *Id.* at 583.

36. *Id.* at 580.

37. 384 So. 2d 1280 (Fla. 1980).

38. *Id.* at 1282 (Boyd, J., concurring and dissenting).

39. *Id.* at 1281 (citations omitted).

ipient or fully emerged—through adjudication without apparent limit.⁴⁰

Acting pursuant to the Speaker's request that chapter 120 be reviewed by the House Committee on Governmental Operations "to assure that the public's interest in a system providing open and factually based decisions, and fair and efficient dispute resolution, is adequately protected,"⁴¹ the committee staff worked with an advisory group of experts to undertake the review.⁴² There was a general perception among the staff and advisory group members that more and more agencies were shunning the rulemaking process and were choosing to rely on the adjudicatory process for the "development" of policy that was already fully developed. There was some suspicion that rulemaking was being avoided by agencies that were pursuing especially controversial policies. And there was strong sentiment that chapter 120 should be amended to limit the discretion the courts had given agencies to decide whether and when they would rulemake. Consequently, the committee staff and the advisory group focused mainly on proposing measures to reform the perceived abuse of non-rule policy making through adjudication. The result of those efforts was House Bill 2539.

The bill proposed creating a new section in chapter 120 immediately following the definition section in the current law.⁴³ The section began with the following statement of legislative intent:

It is the intent of the Legislature that agencies use rulemaking rather than adjudication as the primary method of policy development and implementation. It is the further intent of the Legislature that as

40. See *City of Tallahassee v. Florida Pub. Serv. Comm'n*, 433 So. 2d 505 (Fla. 1983); *Florida Pub. Serv. Comm'n v. Indiantown Tel. Sys., Inc.*, 435 So. 2d 892 (Fla. 1st DCA 1983); *Anheuser-Busch, Inc. v. Department of Bus. Reg.*, 393 So. 2d 1177 (Fla. 1st DCA 1981). If a statute requires an agency to adopt rules to implement its terms, nonrule policy may not be substituted. See *A Professional Nurse, Inc. v. Department of HRS*, 519 So. 2d 1061 (Fla. 1st DCA 1988); *Upjohn Healthcare Servs., Inc. v. Department of HRS*, 496 So. 2d 147 (Fla. 1st DCA 1986); *Perkins v. Department of HRS*, 452 So. 2d 1007 (Fla. 1st DCA 1984).

41. Staff of Fla. H.R. Comm. on Govtl. Ops., CS for HB 2539 (1990) Staff Analysis 2 (final June 4, 1990) (on file with committee).

42. The members of the advisory group were Rip Caleen, Oertel, Hoffman, Fernandez & Cole; Richard Donelan, assistant general counsel, Department of Environmental Regulation; Patricia Dore, associate professor, Florida State University College of Law; Richard Hixson, staff director, House Judiciary Committee; M. Catherine Lannon, chief, Administrative Law Section, Division of Legal Services, Department of Legal Affairs; Steven Pfeiffer, then legal director, 1000 Friends of Florida, and currently general counsel, Department of Community Affairs; Sharyn Smith, director, Division of Administrative Hearings; Dan Stengle, staff director, Senate Committee on Governmental Operations; Carroll Webb, executive director, Joint Administrative Procedures Committee.

43. Fla. HB 2539, § 1 (1990) (proposed FLA. STAT. § 120.525).

soon as feasible, and in as much detail as practicable, policies of general applicability be adopted under the rulemaking procedure provided by § 120.54.⁴⁴

This statement was intended to replace the present essentially neutral legislative position which the courts have interpreted to mean that whether policy is developed through rulemaking or through adjudication is a matter left to agency discretion. The statement clearly and unambiguously stated a legislative preference that rulemaking be used as the primary method for policy development. Guidelines for determining the feasibility and the practicability of rulemaking were specified.⁴⁵ The guidelines attempted to confine the use of unadopted policy to those circumstances when policy truly is incipient in the original *McDonald* sense, or to those circumstances when rulemaking simply is not practicable.

The most controversial aspect of the bill was the remedy it provided when an agency relied on unadopted policy to control a material aspect of an adjudication.⁴⁶ Unless an agency proved by a preponderance of the evidence that it was neither feasible nor practicable to adopt the unadopted policy through regular rulemaking procedures, the agency was liable for reasonable attorneys' fees and costs incurred

44. *Id.* (proposed FLA. STAT. § 120.525(1)).

45.

The factors to be considered when determining whether an agency should have adopted a policy by rulemaking include:

(a) With regard to the feasibility of policy adoption by rulemaking:

1. The extent to which the agency has had the opportunity to accumulate the necessary knowledge and experience to permit resolution of the matter by rulemaking.
2. The extent to which an agency has used the workshop process expeditiously and in good faith to develop rules for adoption.
3. The extent to which the agency has in good faith attempted to adopt rules which support the proposed action.

(b) With regard to the practicability of policy adoption by rulemaking:

1. The extent to which further detail or precision can reasonably be achieved by the agency.
2. The extent to which the particular questions addressed involve complex facts and policy considerations and are of such a narrow scope that more detailed or specific resolution is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

Id. (proposed FLA. STAT. § 120.525(3)(a)-(b)). The concept of requiring rule adoption when feasible and practicable was borrowed from section 2-104 of the 1981 MODEL ACT, *supra* note 12, at 29. The first feasibility criterion and the second practicability criterion were taken from among a number of criteria suggested by Professor Bonfield. See Bonfield, *Mandating State Agency Lawmaking by Rule*, 2 B.Y.U. J. PUB. L. 161, 207-208 (1988).

46. The bill defined the phrase "unadopted policy" to mean a rule "that has not been adopted through the rulemaking procedure provided by s. 120.54." *Id.* (proposed FLA. STAT. § 120.525(2)(c)).

by a principal party.⁴⁷ Principal party was defined to mean “a party whose substantial interests [were] materially affected by an unadopted policy.”⁴⁸ The award of fees and costs was limited to ten thousand dollars to one principal party or an aggregate amount of thirty thousand dollars when more than one principal party was involved in the proceeding.⁴⁹ The demand for fees and costs was to be made by separate petition filed with the Division of Administrative Hearings (DOAH) no later than 21 days after the final order in the original 120.57(1) proceeding was served.⁵⁰ The hearing officer’s order determining whether it was feasible or practicable to adopt unadopted policy as a rule and awarding fees and costs when appropriate was a final order subject only to judicial review.⁵¹ This remedy was exclusive.⁵²

The remedy provided by House Bill 2539 was controversial for a number of reasons. First, the agency could fail to carry the burden of proof necessary to convince the hearing officer that it was not feasible or practicable for it to have adopted the unadopted policy through regular rulemaking procedures. But because this determination was not made until sometime after the final order was rendered, the policy would have been applied and the principal party could have lost the case on the merits, but his or her attorney could recover the fees and costs incurred in “winning.” The principal party could not improve his situation one wit. He could only financially punish the agency for unfairly beating him. Second, because the attorneys’ fees and costs remedy was exclusive, a party could not challenge the unadopted policy in a 120.56 rule validity challenge proceeding. Use of the validity challenge proceeding for contesting an agency’s use of unadopted policy has fallen on hard times, but it is still theoretically available for use against unadopted policy that clearly is generally applicable.⁵³ Third, awarding attorneys’ fees and costs would divert public money away from the agencies’ programs, and, therefore, away from providing necessary public services. This objection was based on the principle of not using tax money to pay for private legal services. There were no reliable estimates of the actual costs likely to result.⁵⁴ Another

47. *Id.* (proposed FLA. STAT. § 120.525(3)).

48. *Id.* (proposed FLA. STAT. § 120.525(2)(b)).

49. *Id.* (proposed FLA. STAT. § 120.525(5)).

50. *Id.* (proposed FLA. STAT. § 120.525(4)).

51. *Id.*

52. *Id.* (proposed FLA. STAT. § 120.525(7)).

53. *See Florida Pub. Serv. Comm’n v. Central Corp.*, 551 So. 2d 568 (Fla. 1st DCA 1989); *Florida State University v. Dann*, 400 So. 2d 1304 (Fla. 1st DCA 1981).

54. Staff of Fla. H.R. Comm. on Govtl. Ops., CS for HB 2539 (1990) Staff Analysis 15 (final June 4, 1990) (on file with committee). The bill did require DOAH to report each award of

concern was that the proposed remedy would result in undesirable satellite litigation. The fear was that claims for fees and costs would be filed routinely after 120.57(1) proceedings were completed.

By the time the Conference convened, these arguments and others had already been voiced. The staff of the House Committee on Governmental Operations prepared what was called a Proposed Staff Amendment.⁵⁵ The text of the amendment was made available to Conference participants.

The Proposed Staff Amendment attempted to meet at least some of the objections that had been raised to House Bill 2539. Under the amendment, when an agency gave notice at least ten days before the 120.57(1) hearing that it intended to rely on identified unadopted policy in the hearing, a principal party had to claim relief before the end of the 120.57(1) proceeding.⁵⁶ If the agency did not carry its burden on the feasible or practicable standard, and if the hearing officer concluded that the unadopted policy could have been and should have been adopted as a rule, then the hearing officer was directed to "invalidate the unadopted policy as applied unless to do so would significantly harm the public interest, unfairly prejudice parties to the adjudication other than the agency, or countermand specific legislative direction of the law being implemented by the agency. . . ."⁵⁷ If any of those events would result from invalidation of the unadopted policy, then the hearing officer was to award the attorneys' fees and costs incurred for the entire 120.57(1) proceeding, up to the limits allowed, as an alternative remedy.⁵⁸ When an agency did not give notice at least ten days before the hearing of its intent to rely on unadopted policy, then the House Bill 2539 remedy discussed above was applicable.⁵⁹ In either event, the remedy specified was exclusive.⁶⁰

fees and costs to the JAPC, which was to include the information in its annual report. In addition, each agency was required annually to report to the governor, the Senate President and the House Speaker information regarding the fees and costs it paid. Fla. HB 2539, § 1 (proposed § 120.525(6)).

55. Fla. HB 2539, Proposed Staff Amendment (undated) (on file with Fla. H.R. Comm. on Govtl. Ops.).

56. *Id.* (proposed FLA. STAT. § 120.525(3)(c)).

57. *Id.* (proposed FLA. STAT. § 120.525(3)(d)).

58. *Id.* The limits on fees and costs in the Proposed Staff Amendment were much higher than the limits in the House bill. The inconsistency between the two was caused by subcommittee action lowering the bill's limits after the amendment had been submitted for publication in the Conference materials. Participants were told to disregard the higher limits in the amendment, and to consider the merits of the amendment based on the assumption that the limits were the same as those in the bill. Transcript of Seventh Admin. L. Conf. proceedings 132 (Mar. 16, 1990) (remarks of Patricia Dore) (transcript on file at Fla. Dep't. of State, Div. of Library Servs., Tallahassee, Fla.)

59. Fla. HB 2539, Proposed Staff Amendment, *supra* note 55 (proposed FLA. STAT. § 120.525(3)(f)).

60. *Id.* (proposed FLA. STAT. § 120.525(4)).

Obviously, many of the objections to the bill's remedy were equally applicable to the alternative remedies proposed by the amendment. The remedies proposed by the amendment, like the bill's, were exclusive. Therefore, a party still lost the right to challenge unadopted policy in a 120.56 proceeding. Attorneys' fees and costs would still be awarded in some circumstances, and thus the objection to using public money to pay for private legal services still was there. Both the awarding of attorneys' fees and costs and the likelihood of satellite litigation would be reduced to the extent that agencies gave the requisite notice of intent to rely on unadopted policy in a 120.57(1) proceeding, but neither would have been eliminated. But the most critical objection advanced against the bill was met in large part. By requiring a party to raise and to litigate the question of whether it was feasible or practicable for the agency to adopt as a rule the unadopted policy it intended to rely on during the very proceeding in which the contested policy was to be used, and by allowing the hearing officer to invalidate the policy in that case, meant that at least the party had the possibility of improving his situation. It was possible to win on the merits because of agency dereliction of duty. Whether that was enough to make the whole concept palatable was a question put to the Conference participants.

The Conference was asked to consider whether the use of unadopted policy was the problem the advisory group thought it had become. And, if some consensus on that matter were reached, the question then became whether any of the solutions proposed an appropriate way to handle it.

B. Subject Matter Indexing of Agency Orders

Since the 1974 revision, chapter 120 has required that agencies "make available for public inspection and copying . . . [a]ll agency orders [and] [a] current subject-matter index, identifying for the public any rule or order issued or adopted after January 1, 1975."⁶¹ In 1979, a provision was added to permit agencies to comply with these requirements "by designating by rule an official reporter which publishes and indexes by subject matter each agency order rendered after a proceeding which affects substantial interests has been held."⁶²

A literal reading of the statute seems to require agencies to keep all orders available and to maintain a subject matter index of all orders

61. Ch. 74-310, § 1, 1974 Fla. Laws 952, 955 (current version at FLA. STAT. § 120.53(2)(b)-(c) (1989)).

62. Ch. 79-299, § 2, 1979 Fla. Laws 1589, 1591 (current version at FLA. STAT. § 120.53(4) (1989)).

issued since the date specified, but by designating an official reporter the duty is only to keep and index orders rendered after a 120.57(1) or (2) proceeding is held. No reason for the different obligations is apparent. Further, the statute does not set forth any criteria for establishing and maintaining an acceptable and accessible subject matter index of agency orders. Nor does the statute require agencies that designate an official reporter to supply orders to that reporter or require the official reporter to index and publish every order that is supplied by agencies. These and other problems with the current statutory requirements relating to indexing and preserving agency orders for public inspection were detailed in a staff report done by the Senate Governmental Operations Committee in 1989.⁶³

The staff report noted that there are only two official designated reporters indexing and publishing agency orders for Florida agencies. One, the Florida Public Employee Reporter, indexes and publishes all Florida Public Employee Relations Commission orders dealing with collective bargaining.⁶⁴ That reporter appears to be satisfying the demands of the statute. The other is the Florida Administrative Law Reports (FALR), which indexes and publishes some of the orders it receives from about eighteen agencies.⁶⁵ The FALR was publishing only about five percent of the total number of pages submitted to it in 1989.⁶⁶ Because of limited space and the large amount of material, the FALR publisher imposes his own selection criteria:

Those orders which are determined by the publisher to have precedential value, thus all orders in which the agency fills in interstices in the statutes, rules, and case law, are published in the FALR. Appropriately, declaratory statements are published also. More specifically, the policy of the FALR is that orders which repeat a point that has been well-decided in prior orders, and which do not state or cite nonrule policy of the type indicated in the *McDonald* decision, do not merit either publication or indexing.⁶⁷

Thus, agencies relying on the FALR to satisfy statutory requirements to make and to maintain a complete subject matter index and

63. Staff of Fla. S. Comm. on Govtl. Ops., *A Review of Indexing of Agency Orders Issued Pursuant to Chapter 120, F. S., The Administrative Procedure Act* (Apr. 1989) (on file with committee) [hereinafter Fla. S. Comm. on Govtl. Ops. Staff Review of Indexing].

64. *Id.* at 63. The Florida Public Employee Relations Commission produces in-house its own publication reporting orders relating to appeals from disciplinary and dismissal actions taken against permanent state employees in the career service. *Id.* at 62.

65. *Id.* at 55.

66. *Id.*

67. *Id.* at 54-55.

to publish all orders resulting from adjudicatory proceedings under 120.57(1) or (2) are coming up far short of the mark. Indeed, the staff report noted that “[u]ntil recently, those orders which were unpublished by the FALR were destroyed.”⁶⁸ Now, orders that are sent to FALR but are not published “are filed and stored in a secure facility.”⁶⁹ The report claimed that for a nominal charge FALR would search and copy documents requested by a subscribing agency.⁷⁰ How this was accomplished without an index was not explained.

Things are even more bleak at agencies that perform the indexing and storing tasks in-house. The following is just a sample of what the staff report contains on this subject:

At least seven [agencies surveyed] fail to fully comply with the law requiring indexing of currently-issued orders. A number of other agencies that have recently designated a reporter, such as in the last three years, had no subject-matter index prior to designation. . . . Attorneys maintain that they are unable to locate orders by subject-matter index at many agencies, either because the index is not maintained at all, or is poorly prepared and maintained. . . . Several agencies either presently maintain, or until recently maintained, only a chronological index or an index by party name. . . . Other agencies have compiled rudimentary indexes that are lists or files of orders by type of case. . . . Such an index might break hundreds of orders down into two or three categories under which researchers must conduct an order-by-order search. Attorneys for some agencies . . . argued . . . the name of a party to a proceeding or the section number of a statute to which a proceeding relates is an adequate designation of subject matter.⁷¹

Living as we do in the age of mainframes, computer databases, modems and the personal computer, perhaps this technology will be used to save what from all accounts is a desperate situation. Indications are, however, that the very few agencies that have gone to computer databases to store agency orders are not inclined to share the information. The Public Service Commission does keep its orders in a database that can be searched using key words. A print out is available quarterly by mail upon request.⁷² In 1989, the Department of Insurance had plans to store its orders in a database by subject matter, but no plans to permit access to the database to anyone but its own attor-

68. *Id.* at 58.

69. *Id.*

70. *Id.*

71. *Id.* at 90-91.

72. *Id.* at 107.

neys. Presumably, everyone else with a need or an interest will have to continue getting by with the FALR, the department's designated reporter.⁷³ There is a glimmer of generosity coming from the Live Oak district office of the Suwannee River Water Management District. According to the staff report, the public may access the district's two databases to locate records of uncontested permits that are issued and to locate by subject matter the district's orders. "The district also prints out a monthly journal based on the information in the computer databases. The journal is available by mail."⁷⁴

Armed with this information about the state of compliance with subject matter indexing and the availability of agency orders for public inspection requirements, the staff of the Senate Governmental Operations Committee went to work crafting a bill to address the many problems it had identified.⁷⁵ The bill passed the Senate;⁷⁶ it was not taken up by the House and died in Senate messages upon adjournment sine die.⁷⁷ The matter remained a priority and during the interim between the 1989 and 1990 regular legislative sessions the study continued and the staff recommendations were refined.⁷⁸ A discussion of the major features of the 1990 version of the bill follows.⁷⁹

First, an amendment to the Public Records Act was proposed to make clear that agency orders required to be indexed or listed by another section of the bill had "continuing legal significance" and must be permanently maintained in accordance with Department of State rules.⁸⁰ Because the Department of State has responsibility for preserving and protecting official state records and other material denominated public records by law, it was the obvious agency to vest with supervisory authority over all other agencies' compliance with the new directives being proposed. Consequently, the Department of State was to be given broad new authority to control and to monitor all agencies' implementation of the new legislative requirements.

73. *Id.*

74. *Id.* at 107-08.

75. Fla. CS for SB 1334 (1989).

76. FLA. S. JOUR. 503 (Reg. Sess. 1989).

77. FLA. LEGIS., HISTORY OF LEGISLATION, 1989 REGULAR SESSION, HISTORY OF SENATE BILLS at 209, CS for SB 1334.

78. Staff of Fla. S. Comm. on Govtl. Ops., A Supplement to A Review of Indexing of Agency Orders Issued Pursuant to Chapter 120, F.S., The Administrative Procedure Act (April 1989) (Mar. 1990) (on file with committee).

79. The result of their efforts was in proposed committee bill form at the time the Conference was held. See Fla. S. Comm. on Govtl. Ops., PCB 90-6. The proposed committee bill became Senate Bill 2550 and ultimately Committee Substitute for Senate Bill 2550 after the Conference ended. All further citations are to the committee substitute bill unless citation to an earlier version is necessary for clarity.

80. Fla. CS for SB 2550, § 1 (1990) (proposed FLA. STAT. § 119.041 (2)).

The heart of the reform measure was to be a major rewrite of section 120.53. The agency orders required to be indexed were specified:

- a. Each final agency order resulting from a proceeding under s. 120.57(1) or (2);
- b. Each final agency order rendered pursuant to s. 120.57(3) which contains a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value;
- c. Each declaratory statement issued by an agency; and
- d. Each final agency order resulting from a proceeding under s. 120.54(4) or s. 120.56.⁸¹

Meaningful access to the first three categories of orders is, without doubt, essential. For that matter, so is access to the fourth category, but the language used creates an ambiguity. Agencies do not render final orders from 120.54(4) or 120.56 proceedings. The final orders from those proceedings are rendered by hearing officers at DOAH. The hearing officers are not agencies, and DOAH, which is an agency, does not render the final orders in those proceedings. Surely, someone should be required to keep a subject matter index of these final orders, but the ambiguous language may result in no one taking the responsibility. In my judgment, DOAH should be responsible for indexing hearing officers' final orders resulting from 120.54(4) and 120.56 proceedings, and that should be made clear by placing a specifically worded provision covering these orders in a separate paragraph. If the agencies whose proposed or existing rules are the subjects of a 120.54(4) or 120.56 proceeding are responsible for indexing the hearing officers' final orders, that obligation must be stated more clearly.

A list containing the names of the parties and the number assigned to the final order rendered pursuant to 120.57(3) would have to be kept if those final orders were excluded from the indexing and public inspection requirements because they did not contain policy statements or have other precedential value. The Department of State would have to approve the exclusions. When making a determination about exclusion, the Department would consider an agency's arguments, but the only orders that could be approved for exclusion were those "of limited or no precedential value, . . . [those] of limited or no legal significance, or [those] which are ministerial in nature. . . ."⁸² This list of excluded orders would have to be available for public in-

81. Fla. CS for SB 2550, § 2 (1990) (proposed FLA. STAT. § 120.53(2)(a)(3)(a)-(d)).

82. *Id.* (proposed FLA. STAT. § 120.53(2)(d)).

spection and copying, and a subject matter index of all listed orders would have to be maintained.⁸³ Indexing or listing of agency orders would have to be done within 120 days after filing in accordance with procedures approved by the Department of State.⁸⁴

All agencies would have to acquire written approval from the Department of State (1) of the specific types of orders that may be excluded from indexing and public inspection; (2) of the method to be used to maintain indexes, lists, and orders that must be indexed or listed and made available to the public; (3) of the method by which indexes, lists, and orders may be inspected or copied; (4) of the numbering system to be used to identify orders that must be indexed or listed; and (5) of the proposed rules the agency intends to adopt relating to these requirements for indexing and making orders available to the public.⁸⁵ In addition, each agency would have to adopt rules that specify (1) the specific types of orders which it excludes (with permission from the Department of State) from indexing and public inspection; (2) the location where indexes, lists, and orders may be inspected or copied, as well as the procedure to be followed when inspection or copying is requested; (3) all systems, including any automated system, in use by the agency to search and find orders, and how assistance and information regarding orders may be received; and (4) the numbering system used to identify orders.⁸⁶ Orders required to be indexed or listed would have to be sequentially numbered in the order they were rendered.⁸⁷

The bill also attempted to deal with the problems encountered by the public when agencies designate an official reporter to index and to publish orders. Agencies still would have been permitted to designate an official reporter to satisfy the indexing and public inspection requirements. However, those requirements would be satisfied only if the official reporter indexed and published all agency orders required to be indexed and made available for public inspection.⁸⁸ This would not permit an official reporter to impose its own selection criteria for

83. *Id.* (proposed FLA. STAT. § 120.53(2)(a)(4)).

84. *Id.* (proposed FLA. STAT. § 120.53(2)(b)). The language in this paragraph is a bit inartful. Orders are not filed, they are rendered. Therefore, the 120 day period within which orders must be indexed or listed should begin when the orders are rendered.

85. *Id.* (proposed FLA. STAT. § 120.53(2)(c)(1)-(5)).

86. *Id.* (proposed FLA. STAT. § 120.53(2)(e)-(h)). The bill also requires agencies to make all search capabilities used by the agency available to the public subject to reasonable terms and conditions, including a reasonable charge. *Id.* (proposed FLA. STAT. § 120.53(2)(g)). But agencies are not required to make the public aware of this obligation to share by adopting a rule disclosing it.

87. Fla. CS for SB 2550, § 3 (1990) (proposed FLA. STAT. § 120.59(1)(c)).

88. Fla. CS for SB 2550, § 2 (1990) (proposed FLA. STAT. § 120.53(4)(a)).

indexing or publishing as the FALR currently does. The listing of all 120.57(3) orders, which need not be indexed because they have no precedential value and do not contain policy statements, could have been done by a designated reporter, but the agency would have been required to retain each listed order and make it available for public inspection.⁸⁹ Those 120.57(3) final orders which the bill required to be indexed because they do contain policy statements or do have precedential value, would not have to be published in full by a designated reporter. However, those orders would have to be kept by the agency and be made available for public inspection, and the official reporter would have to index them and publish a synopsis of each one. The synopsis would have to contain the names of the parties, identify any relevant rule, statute, or constitutional provision involved, provide a factual summary, if one was included in the order, and summarize the final disposition.⁹⁰

The bill would have allowed agencies to publish their own official reporters, or to contract with a publisher to publish their official reporters,⁹¹ or the Department of State could publish or contract for the publishing of agency official reporters. If an agency contracted with a publisher, the agency would have remained responsible for the "quality, timeliness, and usefulness of the reporter."⁹² If the Department of State contracted with a publishing firm, the department would become responsible for quality, timeliness, and usefulness.⁹³

The Senate bill, if enacted, would have brought about long overdue and necessary changes in the way most Florida agencies handle their indexing and public inspection obligations. It may appear to some to have been too heavy handed, but I think not. We have had fifteen years experience with the revised chapter 120, and at all times during those fifteen years agencies have been required to compile and maintain subject matter indexes of their orders and to keep those orders available for public inspection. Left to their own devices, agencies simply have not done the job. The staff report makes the case for reform, but let me add a personal anecdote. Some years ago I was

89. *Id.*

90. *Id.* (proposed FLA. STAT. § 120.53(4)(d)).

91. FLA. STAT. § 120.53(4) (1989) allows an agency to designate an official reporter, but it does not require the agency to contract with the reporter it designates. The staff report noted that neither of the two publishing firms currently designated as official reporters for Florida agencies has contracts with the agencies they serve. Without contracts, of course, the publishers are under no enforceable obligation to continue the service they are providing. This makes the agencies particularly vulnerable to the whims of their publishers. Fla. S. Comm. on Govtl. Ops. Staff Review of Indexing, *supra* note 63, at 73-78.

92. Fla. CS and SB 2550, § 2 (1990) (proposed FLA. STAT. § 120.53(4)(b)).

93. *Id.*

playing with an idea in my mind. I needed a copy of the final order from the *McDonald* case to know whether I was onto something worth pursuing. The final order underlying *McDonald*, the *Marbury v. Madison* of Florida administrative law, was not to be found. It is time, indeed past time in my judgment, for the Legislature to address the many and serious inadequacies in the current system. The Senate bill may not have provided all the solutions, but it certainly would have brought us a long way toward a more useful and accessible system. And, it can be hoped, a system that will not lose or destroy any more of its history.

IV. AGENDA TOPICS AND REPORT

At past administrative law Conferences each small group discussed a different substantive topic and reported its conclusions to the assembled group. This approach enabled Conference participants to select the topic of greatest interest to them, but the downside was that only a few people actually grappled with the details of each of ten substantive topics. At this year's Conference a different approach was tried. Participants were assigned to small groups in an effort to achieve balance between government sector people and private sector people. Each small group, however, was given the same agenda to guide its discussions.⁹⁴ The small groups' agenda items and a summary of their discussions and conclusions presented to the Conference by the small group leaders follow.⁹⁵

94. The agenda originally included nine items. None of the small groups had time to consider the last two topics. They are reproduced here in the interest of completeness. (8) Was Adam Smith Enterprises correctly decided? (See *Adam Smith Enterprises, Inc. v. Department of Environmental Regulation*, 553 So. 2d 1260 (Fla. 1st DCA 1989), articulating standards of review for appeals from rule challenges and from rules adopted after public hearings). If not, what standards should courts use to review the results of the various rulemaking proceedings? (9) On balance, how effective has "the impressive arsenal of remedies" provided by chapter 120 rulemaking procedures been in increasing citizen involvement in the process? Are the procedures unnecessarily cumbersome? Transcript of Seventh Admin. L. Conf. proceedings 137-38 (Mar. 16, 1990).

95. There were ten small groups. The small group leaders were: former Rep. Bob Hector, Dem., Miami, 1966-1980; former Rep. Murray Dubbin, Dem., Miami, 1963-1974; Drucilla Bell, chairwoman of the Administrative Law Section; Arthur England, former Florida Supreme Court Justice and Chief Justice; Betty Steffens, member of the Administrative Law Section Executive Council; Harold Levinson, professor of law at Vanderbilt University; McFerrin Smith, chief judge, Florida Seventh Judicial Circuit; Johnny Burriss, professor of law at Nova University; Sen. Curtis Kiser, Repub., Clearwater, Chairman of the Senate Governmental Operations Committee; and former U.S. Rep. Kenneth "Buddy" MacKay, Dem., Ocala (MacKay currently is lieutenant governor of Florida, and he served in the Legislature from 1968 until 1980). Kiser and MacKay were unable to attend the plenary session on March 17 so Patricia Dore, associate professor of law at Florida State University, and former Rep. William Andrews, Dem., Gainesville, 1966-1978, respectively, filled in for them. William Hyde, member of the Administrative Law Section Executive Council, served as reporter for the Hector group.

A. Should agencies be required to prepare economic impact statements for all rules they propose to adopt or would some mechanism similar to section 3-105 [Regulatory Analysis] of the Model State Administrative Procedure Act (1981) be more appropriate?

Eight small group leaders reported that their groups had considered the economic impact statement question. Among those groups there was broad support for the view that the economic impact statement requirement as interpreted by the courts today is largely useless.⁹⁶ Even apart from the harmless error review standard applied by the courts, two group leaders expressed the view that the whole business of trying to project economic impact was inherently subjective and untrustworthy.⁹⁷

Some groups seemed to think that the agency proposing the rule was not really the proper entity to assay a rule's economic impact. One group thought the Legislature should shoulder the responsibility itself: "They are the ones that will establish policy. They are the ones that will be looking at whether the policy they are establishing is going to have an economic impact in the first instance."⁹⁸ Another group thought perhaps some specialized agency ought to be charged with the task of developing economic impact statements rather than the agency proposing the rule which, it was said, "might have some conflict. . . ."⁹⁹ Yet another group suggested that "the Joint Administrative Procedures Committee hire some economists [who] could serve as consultants to agencies to help them prepare their economic impact statements."¹⁰⁰

At least two groups supported the notion that the Legislature should selectively impose the economic impact statement requirement. One thought it especially necessary when a new tax law was to be implemented by rule.¹⁰¹ The other thought an economic impact statement should be required when "a regulator is given the authority to set fees or to regulate rates or to do [other things that] impact directly upon the consuming public. . . ."¹⁰²

96. Transcript of Seventh Admin. L. Conf. proceedings 34 (Mar. 17, 1990) (remarks of William Hyde); *id.* at 36 (remarks of Murray Dubbin); *id.* at 37 (remarks of Arthur England); *id.* at 40 (remarks of Patricia Dore); *id.* at 42 (remarks of William Andrews); *id.* at 44-45 (remarks of McFerrin Smith).

97. *Id.* at 34 (remarks of William Hyde); *id.* at 43 (remarks of Arthur England).

98. *Id.* at 35 (remarks of William Hyde).

99. *Id.* at 37 (remarks of Murray Dubbin).

100. *Id.* at 37 (remarks of Drucilla Bell).

101. *Id.* at 44 (remarks of Betty Steffens).

102. *Id.* at 43 (remarks of William Andrews).

Two groups that thought imposing the obligation to craft an economic impact statement on agencies did not serve a useful purpose suggested what they considered more appropriate remedies. One group was convinced that the people who will bear economic consequences will communicate that message to the agency. Because the information will be presented by those affected in any event, this group wondered, “[w]hy then force the agency to go through a speculative activity [when] they don’t have the staff[?]”¹⁰³ They preferred to make “undue economic impact” a basis for a validity challenge.¹⁰⁴ The other group seemed less sure that the information would be forthcoming from affected people under the current system. They suggested “that perhaps some form of expanded workshop with the public and the [regulated] industry . . . would do more good for the development of the actual impact. . . .”¹⁰⁵

Only three groups actually endorsed a model based on section 3-105 of the Model State Administrative Procedure Act of 1981.¹⁰⁶ And of those three only one identified the entity that would trigger the preparation of economic impact analyses. That group thought the JAPC should determine when an economic analysis should be done on a proposed rule.¹⁰⁷ In response to an earlier observation that the JAPC staff may lack the necessary expertise to perform this function,¹⁰⁸ the group leader said, “it seems to be a far easier thing for the legislature to add to itself the staff that it needs to do a particular job than it is for the [agencies] to get the legislature to give them the . . . staff they need.”¹⁰⁹

In summary, there is widespread dissatisfaction with the current state of affairs relating to the economic impact statement requirement. Some people think it should be abolished outright. Others worry that some rules should be accompanied by an economic impact analysis. Virtually all agree that this is one area of reform that cries for legislative attention. If streamlining the rulemaking process is a desirable goal, the economic impact statement requirement as it now exists is a major obstacle that should be removed. When the Legislature does look at this problem, I, for one, ask that their response be

103. *Id.* at 38 (remarks of Arthur England).

104. *Id.* at 39-40.

105. *Id.* at 36 (remarks of Murray Dubbin).

106. *Id.* at 37 (remarks of Drucilla Bell); *id.* at 40-41 (remarks of Patricia Dore); *id.* at 45 (remarks of McFerrin Smith).

107. *Id.* at 41 (remarks of Patricia Dore).

108. *Id.* at 38-39 (remarks of Arthur England).

109. *Id.* at 41 (remarks of Patricia Dore).

one that all agencies can do and do well. Otherwise, we will continue to waste time and money on a feels-good-does-nothing venture.

B. Should one person who will be substantially affected by a proposed rule if it is adopted be able to challenge the validity of the proposed rule before it is adopted and becomes effective? Or would it be better to give prefiling review authority to the Attorney General?

Florida appears to be the only state that permits a substantially affected person to challenge the validity of a proposed rule in an administrative adjudicatory proceeding.¹¹⁰ Some states do require review of proposed rules by the attorney general;¹¹¹ others require review by the governor.¹¹² So it seemed appropriate to question whether Florida's unique process was worth keeping.

With only one exception, the small group leaders reported consensus that the validity challenge to proposed rules should be retained.¹¹³ The one dissenting group apparently did not reach consensus, but the group leader reported some sentiment to abolish the validity challenge to proposed rules as a way to simplify the rulemaking process and perhaps to encourage rulemaking.¹¹⁴

110. See Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U.L. REV. 965, 1012 (1986).

111. Ariz. Rev. Stat. Ann. § 41-1041 (Supp. 1989); Colo. Rev. Stat. § 24-4-103(8)(b) (1988); Conn. Gen. Stat. Ann. § 4-169 (West 1988); Ind. Code Ann. § 4-22-2-32 (Burns 1990); Iowa Code Ann. § 17A.4(4)(a) (West 1989); Kan. Stat. Ann. § 77-420(b) (1989); Me. Rev. Stat. Ann. tit. 5, § 8056(1)(A) (1989); Md. State Gov't Code Ann. § 10-107 (Supp. 1990); Mich. Comp. Laws Ann. § 24.245(1) (West Supp. 1990); Minn. Stat. Ann. § 14.26 (West 1988); Neb. Rev. Stat. § 84-905.01 (1987); N.D. Cent. Code § 28-32-02(7) (Supp. 1989); Tenn. Code Ann. § 4-5-211 (1985); Va. Code § 9-6.14:9.1 (1989). In Alaska, proposed rules are reviewed by the Department of Law Alaska Stat. § 44.62.060 (1989). California requires the Office of Administrative Law to review proposed rules, with provision for gubernatorial override. Cal. Gov't Code §§ 11349.3-.5 (West Supp. 1990). In North Carolina, the attorney general's acceptance of rules for filing constitutes prima facie evidence of compliance with the administrative procedure act. N.C. Gen. Stat. § 150B-59(b) (1986). Wyoming requires the attorney general to give advice and assistance to all agencies in preparing, revising, codifying, and editing new and existing rules. Wyo. Stat. § 16-3-104(d) (Supp. 1990).

112. Haw. Rev. Stat. § 91-3(c) (1985); Ind. Code Ann. § 4-22-2-33 (Burns 1990); Iowa Code Ann. § 17A.4(4)(a) (West 1989); Neb. Rev. Stat. § 84-908 (1989); Va. Code § 9-6.14:9.1 (1989); Wyo. Stat. § 16-3-103(d) (Supp. 1990). In Louisiana, the Governor may veto a legislative objection to a proposed rule. La. Rev. Stat. Ann. § 49:968(G) (West 1987). In Vermont, proposed rules are reviewed by an interagency committee on administrative rules appointed by the Governor. Vt. Stat. Ann. tit. 3, § 820 (1985).

113. Transcript of Seventh Admin. L. Conf. proceedings 47 (Mar. 17, 1990) (remarks of Harold Levinson); *id.* (remarks of Betty Steffens); *id.* (remarks of Patricia Dore); *id.* (remarks of McFerrin Smith); *id.* at 48 (remarks of Johnny Burris); *id.* at 48-49 (remarks of Drucilla Bell); *id.* at 49 (remarks of Murray Dubbin); *id.* at 49-50 (remarks of Arthur England).

114. *Id.* at 46 (remarks of William Andrews).

Some groups found the idea of substituting review by the attorney general to be impractical or unworkable in Florida. One group leader reported a feeling in his group that because the attorney general usually was not affected by the proposed rules he would be reviewing, he would lack the incentive to advance a challenge.¹¹⁵ Another group leader noted that a peculiarity of executive branch organization in Florida made the attorney general especially inappropriate to undertake this exercise. Because the Governor and the elected cabinet, which includes the attorney general, sit as the agency head for several agencies, review by the attorney general was seen as creating too many opportunities for conflict.¹¹⁶ Another observed that the attorney general may not be interested in undertaking prefilings review of all agencies' proposed rules.¹¹⁷ Finally, it was noted that the attorney general has no particular expertise qualifying him to perform this assignment.¹¹⁸

Two group leaders reported sentiments in their groups to make the validity challenge less accessible. One thought some aggressive pleading review should be done by DOAH to weed out the meritless challenges that were being used only to delay the rule adoption process.¹¹⁹ Another suggested that a challenger should have to show irreparable harm and the inadequacy of other remedies, including the 120.56 challenge, in order to proceed under 120.54(4).¹²⁰ But two other leaders reported entirely different perspectives of the process. One said that DOAH hearing officers "found convenient and expeditious ways to dispatch those that had no merit without a threshold requirement or without special hearings, . . . they are simply processed effectively and expeditiously through DOAH. . . ."¹²¹ Another noted that her small group recognized that frequently validity challenges were filed by people "to get leverage against the agency" but that this was not objectionable and, indeed, seemed "to be a quite satisfactory way of getting attention."¹²²

On balance, it appears that most people working with this unusual mechanism want to keep it in place. One group that was dominated by agency people concluded that "because it does help people protect

115. *Id.* at 47 (remarks of McFerrin Smith).

116. *Id.* at 49 (remarks of Murray Dubbin).

117. *Id.* at 45-46 (remarks of William Andrews).

118. *Id.* at 49-50 (remarks of Arthur England).

119. *Id.* at 48 (remarks of Johnny Burris).

120. *Id.* at 49 (remarks of Drucilla Bell).

121. *Id.* at 50 (remarks of Arthur England).

122. *Id.* at 51 (remarks of Patricia Dore).

themselves from government, that it was not . . . politically acceptable to talk about abolishment."¹²³

C. Does anyone ever try to drawout of a rulemaking hearing into an adjudicatory proceeding? Is this an innovation whose time has not yet come? Or are agencies accommodating requests for specific procedural protections in rulemaking hearings thus making the drawout unnecessary? Should criteria for granting a drawout be written into the statute or into the Model Rules?

The drawout provision is another aspect of the rulemaking process that appears to be unique to Florida.¹²⁴ It first appeared in the 1974 revision of chapter 120 as part of the adjudicatory hearing provision in 120.57. It was relocated to a more appropriate position in the rulemaking section in 1976.¹²⁵ The drawout provision reads as follows:

Rulemaking proceedings shall be governed solely by the provisions of this section [viz. 120.54] unless a person timely asserts that his 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. If the agency determines that the rulemaking proceeding is not adequate to protect his substantial interests, it shall suspend the rulemaking proceeding and convene a separate proceeding under the provisions of s. 120.57. Similarly situated persons may be requested to join and participate in the separate proceeding. Upon conclusion of the separate proceeding, the rulemaking proceeding shall be resumed.¹²⁶

Eight group leaders reported discussing this topic in their small groups. Only three of those groups had people in them with any actual drawout experience.¹²⁷ The comments that follow fairly represent the tenor of the group leaders' reports: "[N]obody . . . could figure out when you get a draw-out, what have you gotten."¹²⁸ "It was of narrow interest. Nobody was really excited about it. Nobody ever experienced a successful draw-out."¹²⁹ "They agreed it wasn't well understood and

123. *Id.* at 47.

124. See Dore, *supra* note 110, at 1006.

125. See Ch. 76-131, § 3, 1976 Fla. Laws 216, 221 (current version at FLA. STAT. § 120.54(17) (1989)).

126. FLA. STAT. § 120.54(17) (1989).

127. Transcript of Seventh Admin. L. Conf. proceedings 52 (Mar. 17, 1990) (remarks of William Andrews); *id.* at 52-53 (remarks of Murray Dubbin); *id.* at 57 (remarks of William Hyde).

128. *Id.* at 52 (remarks of William Andrews).

129. *Id.* at 55 (remarks of McFerrin Smith).

defined and not used very much, but ought to be retained.”¹³⁰ “My group did not discuss this one indepth. . . . The consensus was to keep the provision as is.”¹³¹ “My group enjoyed the idea that there is something out there and they don’t want to give it up yet and we don’t know how it works.”¹³² Given this widespread lack of understanding about a provision that the Conference participants nevertheless want to retain, perhaps the reader will indulge me here if I depart from my reporter’s role and attempt to explain the concept and how I think it should work.

When an agency wants to adopt a rule, it publishes notice of its intention in the Florida Administrative Weekly. If the proposed rule is one which does not relate exclusively to organization, practice or procedure, persons who will be affected by the rule can compel the agency to conduct a public hearing. The public hearing, if one is requested, will function like a legislative information gathering hearing.¹³³ In the vast majority of rulemaking situations, the relatively informal legislative information gathering hearing is all that is required. On occasion, however, more formal procedures may be necessary. This is when the drawout provision comes into play.

The drawout provision provides that a person who “timely asserts that his substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the [120.54(3)] proceeding does not provide adequate opportunity to protect those interests”¹³⁴ is entitled to the benefit of those procedures which can be shown to be necessary to protect those substantial interests. At this point, the agency has several decisions to make.

First, the agency must decide whether the claimed procedural inadequacy is timely advanced. It is timely if made at any time before the conclusion of the 120.54(3) public hearing.¹³⁵ Second, the agency must determine whether the petitioning person is one who has a right to request greater procedural protection. He is if important or significant concerns personal to him will be affected if the agency adopts the proposed rule under consideration.¹³⁶ Third, the agency must decide whether the petitioning person has affirmatively demonstrated that the specific procedural protections he seeks are necessary to protect his substantial interests. He has if each asserted need is accompanied by a spe-

130. *Id.* (remarks of Arthur England).

131. *Id.* (remarks of Harold Levinson).

132. *Id.* at 58-59 (remarks of Betty Steffens).

133. FLA. STAT. § 120.54(3)(a) (1989).

134. FLA. STAT. § 120.54(17) (1989).

135. See *Balino v. Department of HRS*, 362 So. 2d 21 (Fla. 1st DCA 1978), *cert. denied*, 370 So. 2d 458, *appeal dismissed*, 370 So. 2d 462 (Fla. 1979).

136. Dore, *supra* note 110, at 1003-09.

cific proffer of the facts to be adduced and by an explanation of why the evidence sought to be elicited is necessary to protect his substantial interests.¹³⁷ Fourth, and most important, the agency must decide whether it can expand the 120.54(3) public hearing to accommodate the specific procedural safeguards it agrees are needed to protect the petitioner's substantial interests, or whether it should permit the petitioner to draw out of the 120.54(3) rulemaking hearing and into a 120.57 adjudicatory hearing. This is a judgment call which chapter 120 vests in the agency's discretion. The drawout provision does not require an adjudicatory hearing to be convened unless the agency "determines that the rulemaking proceeding is not adequate to protect [the petitioner's] substantial interests."¹³⁸ Because the contours of the rulemaking hearing are largely within the agency's discretion, and because nothing in chapter 120 suggests that an agency may not introduce more formality into rulemaking hearings, it behooves agencies to expand the 120.54(3) rulemaking hearing.

There is little reported case law on the drawout. What case law there is mainly concerns the availability of the drawout. But from *Balino v. Department of Health & Rehabilitative Services*¹³⁹ we do get a notion of the specific kinds of procedures that would-be drawout petitioners likely would be interested in securing—examination and cross examination of witnesses and sequestration of witnesses. Each of these protections, and perhaps others, can be extended by the agency at the rulemaking hearing. If they are extended, the rulemaking hearing will be more formal than usual, but certainly less formal than a full blown adjudicatory hearing conducted under 120.57(1). But, if the petitioner is offered the procedural safeguards he has demonstrated he needs to protect his substantial interests, what is the harm? The petitioner has what he said he needs and the agency retains control over the development of its policy and saves the considerable amount of time that would be lost if the rulemaking hearing had to be suspended pending the completion of the adjudicatory hearing.¹⁴⁰

On some occasions, however, "agency proceedings . . . [will] affect individual rights and create general policy at the same time, so that they

137. *Balino*, 362 So. 2d at 26.

138. FLA. STAT. § 120.54(17) (1989).

139. *Balino*, 362 So. 2d at 23-24.

140. Apparently some rulemaking hearings held before the Florida Public Service Commission are conducted this way. During a rulemaking hearing "participants [are allowed] to cross examine each other, and to offer argument that would otherwise not be heard in the less formal proceedings." Transcript of Seventh Admin. L. Conf. proceedings 53-54 (Mar. 17, 1990) (remarks of Murray Dubbin).

partake of adjudication and rule-making at the same time."¹⁴¹ In these circumstances, as Professor Levinson noted at the Conference, constitutional due process may require an adjudicatory hearing and the draw-out facilitates that process.¹⁴² Levinson draws his point from the 1908 United States Supreme Court decision of *Londoner v. City and County of Denver*.¹⁴³

In *Londoner*, the city of Denver, upon petition by owners of property located on a street in the city, enacted an ordinance to pave the street. The ordinance included a map, specifications, estimated total cost, and a formula for apportioning the costs of the paving project among the property owners. When the paving project was completed, the city determined the final cost and apportioned that amount among the property owners according to the earlier adopted formula. The apportioning of the total cost and the assessment of individual property owners was also accomplished by ordinance. Some of the property owners filed complaints about their assessments with the city but they were denied a hearing. The ensuing law suit alleged that the enactment of both ordinances violated due process of law.

The Court ruled that the enabling ordinance merely established the foundation for the final assessment and thus was law making in character. Under federal constitutional principles, law making may be done according to any procedures established by state law. The Court went on to hold, however, that the final assessment of the paving costs among the individual property owners was law applying in character. Federal due process principles require law applying decisions to be made only after the affected property owners were given a hearing at which they could offer proof and present arguments contesting the assessments.

The drawout provision in chapter 120 is intended to implement the *Londoner* holding. When agency rulemaking is in effect law making, as it usually is, the procedural protections of the informal information gathering hearing are adequate. But when agency rulemaking is in effect law applying, as it sometimes is, federal due process considerations and chapter 120 require the greater procedural protections associated with administrative adjudication.

The collective memory of the Conference participants recalled only one time when a drawout was actually held, and that involved rezoning

141. Reporter's Comments on Proposed Administrative Procedure Act for the State of Florida, March 9, 1974, at 6, reprinted in 3 A. England & L. Levinson, *FLORIDA ADMINISTRATIVE PRACTICE MANUAL* 6 (1979).

142. Transcript of Seventh Admin. L. Conf. proceedings 55-56 (Mar. 17, 1990) (remarks of Harold Levinson).

143. 210 U.S. 373 (1908).

in Monroe County.¹⁴⁴ By statute all rezoning in the Florida Keys area of critical state concern must be approved by the Department of Community Affairs (DCA).¹⁴⁵ DCA makes these determinations by rule. Rezoning decisions by their very nature are law applying decisions because specific interests of identified property owners are determined. Rule-making that is in effect law applying is precisely the circumstance the drawout was designed to accommodate and where it should be used.

A group of map amendments to the Florida Keys' comprehensive plan were approved by the Monroe County Board of County Commissioners in October, 1987. In December, 1987, DCA published notice of intent to adopt proposed rules which approved some of the requested amendments and disapproved others. Twenty-five property owners whose rezoning requests were disapproved by the proposed rules sought and were granted drawouts. DCA referred all of the drawout cases to DOAH to conduct proceedings under 120.57(1). Ultimately, twenty-four cases proceeded to final hearing and a typical recommended order with findings of fact and conclusions of law issued. The hearing officer agreed with DCA's disapproval in thirteen instances and recommended approval in eleven others. The recommended order was adopted without modification by DCA as its final order.¹⁴⁶ When the rules were adopted by filing, the eleven rezoning requests approved by the hearing officer were included.¹⁴⁷

It was suggested at the Conference that acceptance of a drawout by DOAH poses a potential conflict.¹⁴⁸ Consider this scenario: A drawout petition is sent to DOAH for hearing. The hearing officer concludes, based on the record made at the hearing, that the proposed rule is an appropriate interpretation of the statute being implemented. The agency adopts the recommended order as its final order and the rule is adopted. After the rule becomes effective, a 120.56 rule validity challenge is filed. DOAH would then be in the position in the 120.56 proceeding of second guessing its own prior determination made after the drawout hearing that the rule was a valid interpretation of the agency's statutory authority. As the argument goes, the rule validity challenger

144. Transcript of Seventh Admin. L. Conf. proceedings 57 (Mar. 17, 1990) (remarks of William Hyde); *id.* at 57-58 (remarks of unidentified speaker).

145. FLA. STAT. § 380.0552(9) (1989).

146. In re Petitions for Drawout Proceedings Pursuant to Section 120.54(17), F.S., Concerning the Department of Community Affairs' Proposed Rules 9J-14.006 and 9J-15.006, DOAH Case Nos. 88-1067 RGM, 88-1071 RGM, 88-1074-1077 RGM, 88-1083 RGM, 88-1092 RGM, 88-1100 RGM, 88-1113 RGM, 88-1115 RGM, 88-1117 RGM, 88-1119 RGM, 88-1121 RGM, 88-1122 RGM, 88-1128 RGM (on file with clerk, Div. of Admin. Hearings).

147. FLA. ADMIN. CODE R. 9J-14.006 (1990).

148. Transcript of Seventh Admin. L. Conf. proceedings 60-61 (Mar. 17, 1990) (remarks of unidentified speaker).

would be inclined to believe that the playing field is not level because of the earlier DOAH ruling.

I am not persuaded that this argument would justify a refusal by DOAH to accept drawout hearing requests granted by an agency and referred to DOAH for resolution. First, it seems highly improbable that a person with the requisite interest would pursue both avenues of challenge. But if the improbable did occur, principles of *res judicata* would bar relitigation of the issues resolved in the drawout hearing.¹⁴⁹ Second, because a drawout petition should only be granted in those rare instances when an agency proposed rule is law applying rather than law making, a hearing officer's determination as to the appropriateness of the proposed rule will of necessity be limited to the facts peculiar to the case at hand. Because the hearing officer's determination in the drawout proceeding is fact specific, there is no justification for a validity challenger's concern about the effect of that ruling on his own factually different case. As the Monroe County cases show, what is appropriate on one set of facts can be inappropriate on another.

In summary, most agency rulemaking can be accomplished following a normal 120.54(3) rulemaking hearing. Occasionally, when rulemaking is really law applying because important personal interests of identified people are being decided, normal rulemaking procedures are not adequate. On these occasions, the drawout provision facilitates the transformation of the relatively informal rulemaking process into the formal 120.57(1) adjudicatory process. But between these two extremes lies the truly innovative aspect of the drawout provision. A party to a rulemaking proceeding conducted under 120.54(3) who is able to demonstrate the need for specifically identified procedures in order to protect his substantial interests is entitled to the benefit of those procedures, even though they are not usually associated with rulemaking, during the rulemaking hearing. This expanded rulemaking hearing will accommodate the needs of the petitioner without unduly burdening the agency and without becoming a disincentive to rulemaking.

D. Should agencies be required to republish notice of intent to adopt a proposed rule if substantial changes are made to the text of the proposed rule after the initial notice? Should republication of notice be necessary only if the changes are not made as a result of comments made at the public hearing?

This item was prompted by two concerns. The first was that agencies have too much power to change the language of a proposed rule

149. See *Department of HRS v. Barr*, 359 So. 2d 503, 505 (Fla. 1st DCA 1978); *Department of HRS v. Professional Firefighters of Florida, Inc.*, 366 So. 2d 1276 (Fla. 1st DCA 1979).

after notice of intent to adopt the proposed rule has been published. The second was that a proposed amendment to chapter 120, which would require republication of notice whenever changes substantially alter the text of a proposed rule, might discourage agency willingness to respond to legitimate suggestions made during a public hearing.

Under current law, an agency may change the text of a proposed rule after the proposed rule has been made available for public comment and before the proposed rule is adopted by filing. Section 120.54(13)(b) provides that an agency

may make such changes in the rule as are supported by the record of public hearings held on the rule, technical changes which do not affect the substance of the rule, changes in response to written material relating to the rule received by the agency within 21 days after the notice and made a part of the record of the proceeding, or changes in response to a proposed objection by the [JAPC].

Consequently, people who are happy with a proposed rule and do not ask for or attend a public hearing on the rule, may find out only too late that the entire tenor of the rule was changed after a public hearing was held or after the agency received written information. A particularly nefarious agency can even deliberately mislead some segments of the public by publishing notice of intent to adopt a proposed rule it knows it will change when the "right" people make oral or written presentations in response to the published notice. Furthermore, changes that are made to a proposed rule more than twenty-one days after the notice was published are immune from challenge in a 120.54(4) proceeding because the validity challenge petition must be submitted to DOAH within twenty-one days of the publication of notice to adopt the proposed rule.¹⁵⁰

House Bill 2539 would have amended 120.54(13)(b) to address these perceived problems. The bill provided that an agency "may not change a proposed rule in a manner that substantially alters the substance of the rule. However, an agency may terminate a rulemaking proceeding and commence a new rulemaking proceeding for the purpose of adopting a changed rule."¹⁵¹ The provision also stated criteria for determining whether a change to a proposed rule would substantially alter its substance, thus requiring republication of notice.

150. FLA. STAT. § 120.54(4)(b) (1989). The time for filing was held to be jurisdictional in *Department of Health & Rehabilitative Services v. Alice P.*, 367 So. 2d 1045, 1053 (Fla. 1st DCA 1979). See also *Shellfish Farmers Ass'n, Inc. v. Florida Marine Fisheries Comm'n*, 12 Fla. Admin. L. Rep. 39 (1989).

151. Fla. HB 2539, § 2 (1990) (proposed amendment to FLA. STAT. § 120.54(13)(b) (1989)).

The small group leaders reported a variety of responses to this agenda item. Three groups endorsed the provision in House Bill 2539.¹⁵² They were troubled by the basic unfairness of a system that permits changes to be made to a proposed rule without requiring notice to be given to those affected by the changes. Two of these groups seemed to be influenced by the fact that the house bill provision was drawn from the 1981 Model Act.¹⁵³

Two other groups thought such a provision would either lead to a never ending process,¹⁵⁴ or would discourage agencies from making needed changes to proposed rules.¹⁵⁵ Both seemed to believe there was a problem, but neither was prepared to support a solution that would further encumber the rulemaking process. One group thought that, at least with respect to rulemaking in a highly regulated area, the original notice was adequate to advise everyone that they had better participate to be sure their interests were protected.¹⁵⁶ The other group proposed that an agency that substantially changed a proposed rule after publication of the original notice be required to publish notice that substantial changes were made when the rule is adopted. They viewed their proposal as sound because rulemaking was not delayed and because people affected by the changes would be notified promptly so

152. Transcript of Seventh Admin. L. Conf. proceedings 65 (Mar. 17, 1990) (remarks of Harold Levinson); *id.* at 67 (remarks of Murray Dubbin); *id.* at 68-69 (remarks of William Andrews).

153. 1981 Model Act, *supra* note 12, § 3-107 at 42 provides as follows:

(a) An agency may not adopt a rule that is substantially different from the proposed rule contained in the published notice of proposed rule adoption. However, an agency may terminate a rule-making proceeding and commence a new rule-making proceeding for the purpose of adopting a substantially different rule.

(b) In determining whether an adopted rule is substantially different from the published proposed rule upon which it is required to be based, the following must be considered:

(1) the extent to which all persons affected by the adopted rule should have understood that the published proposed rule would affect their interests;

(2) the extent to which the subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule; and

(3) the extent to which the effects of the adopted rule differ from the effects of the published proposed rule had it been adopted instead.

154. Transcript of Seventh Admin. L. Conf. proceedings 62 (Mar. 17, 1990) (remarks of Robert Hector).

155. *Id.* at 65 (remarks of Arthur England).

156. *Id.* at 63 (remarks of William Hyde). Hyde was especially concerned about the effects of a republication requirement as applied to HRS when it proposes rules in the certificate of need area. In this circumstance, the most interested people are health care providers with lawyers on retainer carefully watching every move HRS makes. *Id.* at 69. Hyde ultimately concluded that the HRS situation might be one of those that should be addressed specifically and not by a "generic APA remedy [that] doesn't really fit . . . [this] particular agency." *Id.*

they could challenge the rule in a 120.56 validity challenge proceeding.¹⁵⁷

Two groups noted with approval that if a republication provision similar to the one contained in the House bill were to become law, agencies would be encouraged to conduct workshops on proposed rules.¹⁵⁸ To the extent that would be a consequence, the effect certainly would be salutary. Agencies that are able to iron out the kinks using the workshop model will not have to face unforeseen problems with their proposed rules after notice is published the first time. It will be rare that republication will be required.

Finally, three groups specifically addressed the question whether people should have another twenty-one day period after republication to file 120.54(4) validity challenges to the substantially changed proposed rule. One group recommended that the time be reduced to fourteen days.¹⁵⁹ The other two groups seemed comfortable with the full twenty-one days.¹⁶⁰

While support for the republication provision in House Bill 2539 was not unanimous, it was substantial. The fears expressed by some that additional delay in the rulemaking process will result are real. But the basic unfairness of "having a rule change midstream 180 degrees and not notify the public about [it]"¹⁶¹ does need legislative attention. Perhaps the concerns of both sides of this question will be met if a republication requirement does result in increased use of the workshop to develop proposed rules as some believe it will.

E. Is the Joint Administrative Procedures Committee (JAPC) performing a useful function or is filing proposed rules with them merely a "hassle"? Could the JAPC be doing more to improve the rulemaking process?

Most agencies must file copies of all rules they propose to adopt with the JAPC.¹⁶² The proposed rules along with the material that

157. *Id.* at 65-66 (remarks of Arthur England).

158. *Id.* at 66 (remarks of Drucilla Bell); *id.* at 67 (remarks of Murray Dubbin).

159. *Id.* at 67 (remarks of Drucilla Bell).

160. *Id.* at 64 (remarks of Patricia Dore); *id.* at 69 (remarks of William Andrews).

161. *Id.* at 67 (remarks of Murray Dubbin).

162. FLA. STAT. § 120.54(11)(a) (1989). Local school districts, community college districts and local units of government with jurisdiction in only one county are not required to file copies of proposed rules with the JAPC. Copies of emergency rules adopted by all agencies other than those listed above must be filed with the JAPC. *Id.* In addition to the text of proposed rules, agencies must also file detailed written statements of the facts and circumstances justifying each proposed rule, a copy of the notice of intent to adopt each rule that was published in the Florida Administrative Weekly, a copy of the economic impact statement, and a statement indicating whether the proposed rule imposes more stringent standards, or the same standards imposed by federal law, or that no federal law on the subject exists. *Id.*

must accompany them are reviewed by the JAPC acting as a "legislative check on legislatively created authority."¹⁶³ If the JAPC objects to any proposed rule, it must certify that fact to the agency and give the agency a detailed statement of its objections.¹⁶⁴ An agency may agree to modify a proposed rule in response to the objection, withdraw the proposed rule, or refuse to do either.¹⁶⁵ In the event an agency refuses to modify or to withdraw a proposed rule in light of the JAPC's objection, the JAPC submits a detailed written statement of its objections to the Department of State, which publishes the statement in the Florida Administrative Weekly. The location of the full text of the objection is also published as a history note to the rule when it is published in the Florida Administrative Code.¹⁶⁶ In addition to its authority to monitor agency rulemaking, the JAPC is also responsible for "[g]enerally review[ing] agency action pursuant to the operation of the Administrative Procedure Act . . . and [for] recommend[ing] needed legislation or other appropriate action."¹⁶⁷

Most of the small group leaders reported general satisfaction with the work of the JAPC. Those groups that thought of the JAPC as providing technical assistance to agencies engaged in rulemaking were generally pleased with its performance.¹⁶⁸ One group noted that the JAPC staff does a lot of work behind the scenes with the staffs of agencies and, as a result, is able to avoid a showdown between agencies and the JAPC over rulemaking authority.¹⁶⁹ Another complimented the JAPC staff for doing "a very quick, efficient, useful job [that] probably [improves the] work product"¹⁷⁰ in the early stages of the rulemaking process. Yet another likened the JAPC to "a good cop

163. FLA. STAT. § 120.545(1) (1989). The JAPC is to determine whether:

- (a) The rule is an invalid exercise of delegated legislative authority;
- (b) The statutory authority for the rule has been repealed;
- (c) The rule reiterates or paraphrases statutory material;
- (d) The rule is in proper form;
- (e) The notice given prior to its adoption was sufficient to give adequate notice of the purpose and effect of the rule; and
- (f) The economic impact statement accompanying the rule is adequate to accurately inform the public of the economic effect of the rule.

164. *Id.*

165. FLA. STAT. § 120.545(2)(a) (1989).

166. FLA. STAT. § 120.545(8) (1989).

167. FLA. STAT. § 11.60(2)(e),(f) (1989).

168. Transcript of Seventh Admin. L. Conf. proceedings 73-74 (Mar. 17, 1990) (remarks of McFerrin Smith); *id.* at 74-75 (remarks of Murray Dubbin); *id.* at 75-76 (remarks of Arthur England); *id.* at 76 (remarks of William Hyde); *id.* at 77 (remarks of Betty Steffens); *id.* at 78 (remarks of Robert Hector); *id.* at 80-81 (remarks of Harold Levinson).

169. *Id.* at 74 (remarks of McFerrin Smith).

170. *Id.* at 77 (remarks of Betty Steffens).

on the beat.”¹⁷¹ Just the fact that JAPC is there probably discourages “mischievous activity”¹⁷² by agencies. Finally, one group thought the JAPC served a particularly important function by being the one place in state government that has an institutional memory about the origins and purposes of the Administrative Procedure Act.¹⁷³ There was a discordant note sounded by one group that expressed the view that the JAPC was “like an academic operation. They live in their own . . . hallowed halls. . . . [T]hey don’t have a sense of the law in operation.”¹⁷⁴ This group thought the JAPC could improve its usefulness if the staff became better acquainted with how the agencies actually work and the pressures under which they function.¹⁷⁵

There was some sentiment for sharpening the bite of an unheeded JAPC objection to a proposed rule. One group recommended consideration of a provision in the 1981 Model Act that places the burden on the agency of establishing that a rule objected to by the JAPC is within the agency’s delegated statutory authority.¹⁷⁶ If adapted to the Florida statutory scheme, this burden shifting could occur in several situations. The first could be on judicial review of rulemaking proceedings conducted under 120.54(3). The second could be when either a validity challenge is filed against the proposed rule or later after the rule becomes effective. In both instances, the agency would have to shoulder the burden before the hearing officer in the first place and on judicial review of the hearing officer’s final order. The third could be when the agency seeks to enforce the terms of the rule and a 120.57 proceeding is requested. Presumably, the agency would have to carry the burden of justification before the hearing officer and on judicial review. Finally, the burden shifting could occur when either the agency or a substantially interested resident of the state filed an action in circuit court to seek enforcement of the rule objected to by the JAPC.¹⁷⁷

Perhaps the harshest criticism of the JAPC was expressed as an individual’s observation rather than as a group report. William An-

171. *Id.* at 76 (remarks of William Hyde).

172. *Id.*

173. *Id.* at 75-76 (remarks of Arthur England).

174. *Id.* at 79 (remarks of Johnny Burris).

175. *Id.*

176. *Id.* at 75 (remarks of Murray Dubbin). The provision Dubbin eluded to says:

After the filing of an objection by the committee that is not subsequently withdrawn, the burden is upon the agency in any proceeding for judicial review or for enforcement of the rule to establish that the whole or portion of the rule objected to is within the procedural and substantive authority delegated to the agency.

1981 Model Act, *supra* note 12, § 3-204(d)(5), at 62.

177. FLA. STAT. § 120.69 (1989).

drews, reporting for Kenneth "Buddy" MacKay in his absence, noted that MacKay "was disappointed that JAPC did not take a role in monitoring the effectiveness of the Administrative Procedure[] Act."¹⁷⁸ If the JAPC saw a role for itself to act as "an oversight supervisory body on the whole administrative process,"¹⁷⁹ it could recommend needed legislative changes to the statute in response to judicial decisions. The specific example used suggested that a process oriented JAPC would have picked up on the implications of the *McDonald* opinion's introduction of incipient agency policy into the process, and perhaps made recommendations to the Legislature to control those implications much sooner.¹⁸⁰

Most Conference participants were satisfied with the work the JAPC is doing. Presumably, the group leaders' reports on this question were strongly influenced by the experiences of agency people, who, after all, have the most contact with the JAPC. From their perspective, the JAPC is providing a valuable service to the executive branch by emphasizing its role as technical assistance liaison between the executive and legislative branches. However, it is not surprising that a former legislator would think of the JAPC's mission in terms of the service it provides to the Legislature. MacKay's disappointment with the JAPC's failure to oversee the development of the whole administrative process and to be responsible for keeping the Legislature informed about those developments, while not widely shared by other Conference participants, has surfaced as a major criticism of the JAPC's performance in a post-Conference House of Representatives staff review.¹⁸¹ It is likely that the JAPC will be rethinking its mission

178. Transcript of Seventh Admin. L. Conf. proceedings 80 (Mar. 17, 1990) (remarks of William Andrews).

179. *Id.*

180. *Id.*

181. See letter from David K. Coburn, then staff director, House Majority Office, to Carroll Webb, executive director, Joint Administrative Procedures Committee (Oct. 16, 1990) (on file with House Speaker's office). The letter's author is now chief of staff of the House and top aide to Speaker T.K. Wetherell, Dem., Daytona Beach.

In preparation for assuming the speakership in November, 1990, Wetherell directed House staff to review and evaluate the services provided to the House by the joint committees of the Legislature. The review and evaluation of the JAPC revealed significant communication problems that impaired the legislative oversight function. According to the letter from Coburn, the Speaker-designate requested that the following recommendations be made to the JAPC:

1. The [J]APC should discuss all evaluations of existing and proposed rules with the appropriate legislative staff as a routine part of the Committee's review.
2. The [J]APC should develop a standard format for language in proposed legislation that legislative staff can use in drafting legislation.
3. The [J]APC should develop a shared data base of information on rule evaluations that could be accessed by other legislative staff. This should include the existing data

as a result of this internal criticism and perhaps direct some effort toward providing better service to the Legislature.

F. Is HB 2539 a reasonably good way to control perceived abuses of incipient policy making? Is the Proposed Staff Amendment a better attempt? Is it a better remedy to deny agencies final order authority in those instances when they choose to rely on unadopted policy, which feasibly and practicably could have been adopted as a rule? If these ideas are wrongheaded, what, if anything else, should be considered?

This item received the greatest amount of discussion time in the small groups and in the plenary session. There was a split opinion on the premise of the item, that is, that agencies are relying too much on adjudication to develop policy and something should be done to restore the balance between rulemaking and adjudication. There was, however, almost universal agreement that the solutions proposed by House Bill 2539 and by the Proposed Staff Amendment were very bad ideas. No group leader even mentioned the third suggested remedy of denying agencies authority to issue final orders in those cases when they chose to rely on nonrule policy that feasibly and practicably could have been adopted as a rule. This third remedy, therefore, died for lack of a second. In short, most participants seemed to agree that there is a problem, but they rejected all proposed solutions in favor of suggesting some interesting ideas of their own to deal with the problem.

Two groups were strongly of the view that agency policy making through adjudication was entirely in keeping with acceptable administrative behavior.¹⁸² One of these two groups may well have been influenced by the historical perspective of the group leader, McFerrin Smith, who was the executive director of the Florida Law Revision

base containing the Attorney[] General's opinions. The long range goal should be to develop a single legislative oversight data base that contains comments and evaluations by all legislative entities involved in oversight.

4. The [J]APC, as a routine part of the Committee's review should make recommendations to the appropriate legislative committee when they identify statutory changes that are necessary.

Id. at 2. The Speaker-designate also expressed concern that policymaking by adjudication was being used to avoid the rulemaking process and the Legislature's function. He characterized this phenomenon as "phantom government." *Id.* It is interesting to note that the "phantom government" phrase was coined by former Senator Dempsey Barron, Dem., Panama City, back in 1974 and was used by him as shorthand for all the evils revised chapter 120 would address when enacted into law. Barron served in the House from 1956-1960 and in the Senate from 1960 until 1988.

182. Transcript of Seventh Admin. L. Conf. proceedings 86 (Mar. 17, 1990) (remarks of McFerrin Smith); *id.* at 88 (remarks of Johnny Burriss).

Council when the Administrative Procedure Act was revised in 1973-1974.¹⁸³ According to Smith, the Law Revision Council both acknowledged and approved agency lawmaking through processes other than rulemaking. He cited the requirement to index all agency orders in the revised statute as an acknowledgment of the principle that agencies would make law through adjudication.¹⁸⁴ This group, therefore, concluded that:

[when] policies merely evolve because of repeated decision making, whether those policies become capable of converting to a rule or not, . . . it [is not] an appropriate way of regulating administrative agencies to force them into the rulemaking mode when the rest of our entire legal system accepts the common law method of evolving law.¹⁸⁵

The other group "thought incipient policy making is a fine way for the agency to exercise its discretion. There was real doubt that incipient policy making created a problem."¹⁸⁶ It should be noted, however, that this group seemed more inclined than the other to indulge the perception of others that abuse does exist, and to suggest a solution to that problem.¹⁸⁷

One other group thought nonrule policy should be prohibited in some areas but not in others. This group was particularly concerned about the use of nonrule policy in disciplinary proceedings. Accordingly, the group recommended that any standards of conduct licensed professionals were expected to meet should be adopted as rules. "[D]isciplinary proceeding[s] should never be [based on] incipient policy."¹⁸⁸

One group clearly reported reaching consensus "that there is a problem with the excessive use of . . . unadopted rules[.]"¹⁸⁹ There was apparently a difference of opinion between group members and the group leader in another case.¹⁹⁰ The remaining group leaders did

183. *Id.* at 85 (remarks of McFerrin Smith).

184. *Id.* at 86 (remarks of McFerrin Smith). When chapter 120 was revised in 1974 and at all times since agencies have been required to make available "[a] current subject-matter index, identifying for the public any rule or order issued or adopted after January 1, 1975." Ch. 74-310, § 1, 1974 Fla. Laws 952, 955 (current version at FLA. STAT. § 120.53(2)(c) (1989)).

185. *Id.* at 87 (remarks of McFerrin Smith).

186. *Id.* at 88 (remarks of Johnny Burris).

187. See notes 202 through 207 and accompanying text, *infra*.

188. *Id.* at 83 (remarks of William Andrews).

189. *Id.* at 92 (remarks of William Hyde).

190. *Id.* at 84 (remarks of Murray Dubbin); *id.* at 101-02 (remarks of Murray Dubbin).

not challenge the premise that abuse does exist, but rather went directly to the question of appropriate remedy.¹⁹¹

As noted earlier, there was very little support for the sanctions proposed by either House Bill 2539 or by the Proposed Staff Amendment.¹⁹² The comments rejecting the idea of imposing attorneys' fees and costs as the penalty for using incipient policy that should have been adopted as a rule ranged from "a resounding no"¹⁹³ to "not the right way to go [because] [t]hat would not necessarily give an incentive to an agency and [would be] unduly burdensome primarily on the tax-paying public,"¹⁹⁴ to "it [is] unconscionable in this day of scarce money and tight agency budgets to be handing out \$10,000 to private lawyers."¹⁹⁵ Only one group suggested that the economic sanctions were "an important option that needed to be left open to the hearing officer[s]."¹⁹⁶

In contrast, there was substantial support for adding a statement of legislative preference for rulemaking to the statute.¹⁹⁷ Those who addressed the point appeared to support a legislative preference for rulemaking when it was determined that rulemaking was feasible and practicable as those terms were defined in House Bill 2539.¹⁹⁸ In addition, several other remedies were suggested by the small groups. Some suggested that perhaps the JAPC could play a role in identifying and reining in those agencies that excessively rely on adjudication to develop policy.¹⁹⁹ Another suggestion was that any action taken pursuant to an unadopted rule should be void.²⁰⁰ Yet another suggestion was that an agency be given a certain period of time after the conclusion of a 120.57 proceeding in which incipient policy was involved to

191. *Id.* at 93-94 (remarks of Harold Levinson); *id.* at 97 (remarks of Drucilla Bell); *id.* at 97-99 (remarks of Patricia Dore); *id.* at 99-100 (remarks of Betty Steffens).

192. *Id.* at 83 (remarks of William Andrews); *id.* at 85 (remarks of Murray Dubbin); *id.* at 85 (remarks of McFerrin Smith); *id.* at 92 (remarks of William Hyde); *id.* at 94 (remarks of Harold Levinson); *id.* at 98 (remarks of Patricia Dore); *id.* at 99 (remarks of Betty Steffens).

193. *Id.* at 85 (remarks of McFerrin Smith).

194. *Id.* at 85 (remarks of Murray Dubbin).

195. *Id.* at 98 (remarks of Patricia Dore).

196. *Id.* at 97 (remarks of Drucilla Bell).

197. *Id.* at 85 (remarks of McFerrin Smith); *id.* at 93 (remarks of William Hyde); *id.* at 93-94 (remarks of Harold Levinson); *id.* at 99 (remarks of Patricia Dore); *id.* at 102 (remarks of Stephen Maher); *id.* at 116 (remarks of William Reeves, senior attorney, Department of Banking and Finance).

198. *Id.* at 89 (remarks of Johnny Burris); *id.* at 95 (remarks of Harold Levinson); *id.* at 100-01 (remarks of Murray Dubbin); *id.* at 117-18 (remarks of Stephen Maher); *id.* at 118-20 (remarks of Patricia Dore); *id.* at 122-23 (remarks of William Hyde).

199. *Id.* at 85 (remarks of Murray Dubbin); *id.* at 90 (remarks of Johnny Burris); *id.* at 98 (remarks of Patricia Dore).

200. *Id.* at 84 (remarks of Murray Dubbin).

initiate rulemaking procedures to convert the incipient policy into a rule.²⁰¹

Perhaps the most comprehensive and well thought out solution to the problem was suggested by a group that recommended an approach based on strengthening the 120.54(5) initiative process.²⁰² This group supported amending the statute to include a legislative preference for rulemaking when rulemaking was feasible and practicable.²⁰³ They would also amend 120.54(5) to permit a party who is on the receiving end of incipient policy, or the JAPC, to petition for rulemaking.²⁰⁴ The agency would be required to adopt the incipient policy, or some modified version of the incipient policy, as a rule unless it could sustain the burden of demonstrating that rule adoption was not feasible or practicable.²⁰⁵ The group believed that the advantage of their proposal was that it gave the people actually affected by the use of incipient policy the power to compel rulemaking.²⁰⁶ The group also supported a streamlined rulemaking process, providing only notice and comment opportunity, if the agency intended to adopt the incipient policy it was already using.²⁰⁷ The group did not address the question of what incentive there was for any private person to use this remedy. If a party's substantial interests have already been determined after a 120.57 proceeding in which the agency relied on incipient policy, why would a party spend more time and money to make sure that that same policy is enshrined in a rule, particularly if rulemaking will not include an opportunity to challenge the validity of the proposed rule in a 120.54(4) proceeding? Because the JAPC would have an institutional interest in seeing that unadopted policy is adopted in accordance with the Legislature's expressed preference, it could be expected to pursue this remedy, but private persons simply would have no incentive to use it.

The staff of the House Governmental Operations Committee went to school at the Conference. The criticisms of House Bill 2539 were

201. *Id.* at 99-100 (remarks of Betty Steffens).

202. FLA. STAT. § 120.54(5) (1989) provides in pertinent part:

Any person regulated by an agency or having a substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule. . . . The petition shall specify the proposed rule and action requested. Not later than 30 calendar days after the date of filing a petition, the agency shall initiate rulemaking proceedings under this act, . . . or deny the petition with a written statement of its reasons for the denial.

203. Transcript of Seventh Admin. L. Conf. proceedings 89 (Mar. 17, 1990) (remarks of Johnny Burris).

204. *Id.* at 90.

205. *Id.* at 89-90.

206. *Id.* at 90.

207. *Id.* at 91.

heard and taken to heart. The bill was still in committee at the time and several important changes were made to it after the Conference to bring its provisions closer to the views expressed by Conference participants. Specifically, Committee Substitute for House Bill 2539 stated that “[a]gencies shall adopt those policies defined by s. 120.52(16) as rules through the rulemaking procedure provided by s. 120.54 when feasible and to the extent practicable.”²⁰⁸ The criteria for determining feasibility and practicability remained unchanged.²⁰⁹ Any claim for relief had to be made during the adjudicatory proceeding in which incipient policy was sought to be applied.²¹⁰ When the hearing officer agreed that “[i]t was feasible and practicable for the agency to have adopted the policy by rulemaking at the time the agency relied on the policy in support of its action or proposed action. . . .,”²¹¹ the hearing officer would have to invalidate the policy and not permit it to be used in the case, unless that action “would significantly harm the public or unfairly prejudice parties to the adjudication other than the agency. . . .”²¹² In addition, the hearing officer would have to order the agency to begin rulemaking proceedings within ninety days after the final order in the case was rendered.²¹³ The hearing officer’s findings relevant to this claim were made “final and binding on the agency.”²¹⁴ In the event the hearing officer concluded that it was not feasible or practicable for the agency to adopt the nonrule policy as a rule, provision was made for consideration of the nonrule policy by the hearing officer in the 120.57 proceeding:

The nonrule policy that is ultimately applied as that of an agency . . . shall be that which best complies with and promotes the intent of the Legislature. The determination of the nonrule policy to be applied by an agency shall be based exclusively on evidence of record and matters officially recognized. Recommended and final orders . . . shall provide an explanation of nonrule policy that includes the evidentiary basis that supports the nonrule policy applied and a

208. Fla. CS for HB 2539, § 1 (1990) (proposed FLA. STAT. § 120.525(1)).

209. See *supra* note 45.

210. Fla. CS for HB 2539, § 1 (1990) (proposed FLA. STAT. § 120.525(3)(c)).

211. *Id.* (proposed FLA. STAT. § 120.525(3)(a)(2)).

212. *Id.* (proposed FLA. STAT. § 120.525(3)(d)(1)).

213. *Id.* (proposed FLA. STAT. § 120.525(3)(d)(2)). A petition to enforce an order to begin rulemaking may be filed in circuit court by any substantially affected person. If the court enters an order enforcing the hearing officer’s order, the petitioner may be awarded the attorneys’ fees and costs expended in connection with the enforcement proceeding. Any award of fees and costs must be paid from the budget of the highest ranking administrator of the agency, and the agency is not entitled to reimbursement under any other provision of law. *Id.*

214. *Id.* (proposed FLA. STAT. § 120.525(3)(e)).

general discussion of the justification for the nonrule policy applied.²¹⁵

Finally, the committee substitute amended 120.56 to permit a person substantially affected by a nonrule policy to challenge it as a violation of the legislative directive that all policies be adopted as rules when feasible and to the extent practicable.²¹⁶ The hearing officer could find all or part of a nonrule policy to be invalid and order the agency to begin rulemaking proceedings.²¹⁷ The rulemaking proceedings would have to be initiated within ninety days after the final order from the validity challenge proceeding was rendered.²¹⁸

Committee Substitute for House Bill 2539 was reported favorably by the House Governmental Operations Committee and was passed by the House.²¹⁹ The bill was referred to the Senate Committee on Governmental Operations where it died upon adjournment sine die of the 1990 regular session.²²⁰

G. Should we be less concerned with making agencies adopt rules and be more concerned with perfecting the subject matter indexing and availability of adjudicative orders so that access to agency unadopted policy precedents is a reality?

This item tied the issue of agency use of adjudicatory procedures to develop policy with the issue of agency failure to develop and maintain useful and accessible subject matter indexes of agency orders. Indeed, several groups responded to this question by saying that, in effect, if there were a better indexing system in place that would go a long way toward solving a major complaint about nonrule policy—people cannot find it.²²¹ But even apart from the obvious connection to the nonrule policy problem, the general lack of complete and acces-

215. Fla. CS for HB 2539, § 4 (1990) (proposed FLA. STAT. § 120.57(1)(b)(15)(b)).

216. Fla. CS for HB 2539, § 3 (1990) (proposed FLA. STAT. § 120.56(1)(b)).

217. *Id.* (proposed FLA. STAT. § 120.56(3)(c)).

218. *Id.* (proposed FLA. STAT. § 120.56(6)). A petition to enforce an order to begin rulemaking may be filed in circuit court by any substantially affected person. If the court enters an order enforcing the hearing officer's order, the petitioner may be awarded the attorneys' fees and costs expended in connection with the enforcement proceeding. Any award of fees and costs must be paid from the budget of the highest ranking administrator of the agency, and the agency is not entitled to reimbursement under any other provision of law. *Id.*

219. FLA. H.R. JOUR. 786 (Reg. Sess. 1990).

220. FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, HISTORY OF HOUSE BILLS at 419, CS for HB 2539.

221. Transcript of Seventh Admin. L. Conf. proceedings 83 (Mar. 17, 1990) (remarks of William Andrews); *id.* at 84 (remarks of Murray Dubbin); *id.* at 88-89 (remarks of Johnny Burris); *id.* at 108-09 (remarks of McFerrin Smith); *id.* at 110-11 (remarks of Drucilla Bell).

sible subject matter indexes stands on its own as a problem of monumental proportions. Addressing the indexing problem was characterized as a "fundamental reform that had to be carried into effect."²²² Without exception, each of the small group leaders who reported on this item either resoundingly endorsed the need for improvement,²²³ or offered ideas about how an improved system would benefit the process.²²⁴

In addition to facilitating the location of incipient and other non-rule policy, one group noted that a subject matter index helps people within an agency, as well as those outside, to discover inconsistencies in the application of policies.²²⁵ The same group observed that a good indexing system could protect against abrupt changes in policy caused by changing political appointments of agency heads.²²⁶

Two groups paid particular attention to the details of making both an indexing system and the orders themselves more accessible. One encouraged the use of computer databases and a system that would permit the database to be searched in a way similar to WESTLAW or LEXIS.²²⁷ The other stressed the importance of developing systems that fit the needs of the individual agencies. What works well for one agency may not work at all for another. This group also thought it important that subject matter indexes be as inclusive as possible so that orders other than those resulting from a 120.57 adjudicatory hearing are included.²²⁸ They suggested "including declaratory statements, consent orders and perhaps even policy memoranda that the agency wants to employ."²²⁹ On that last point, another group indicated that indexing could become a real nuisance if too many things had to be indexed. They saw a need for a more precise definition of what needs to be indexed.²³⁰

Finally, one group made several suggestions about ways in which compliance with any subject matter index requirement could be policed. One idea was to require that an order be indexed before it could be used as precedent.²³¹ Another was to require the auditor general to

222. *Id.* at 88-89 (remarks of Johnny Burris).

223. *Id.* at 108 (remarks of Harold Levinson); *id.* at 108 (remarks of Murray Dubbin); *id.* at 113 (remarks of Johnny Burris).

224. *Id.* at 83 (remarks of William Andrews); *id.* at 109 (remarks of McFerrin Smith); *id.* at 110-11 (remarks of Drucilla Bell); *id.* at 111 (remarks of William Hyde).

225. *Id.* at 109 (remarks of McFerrin Smith).

226. *Id.*

227. *Id.* at 113 (remarks of Johnny Burris).

228. *Id.* at 111 (remarks of William Hyde).

229. *Id.*

230. *Id.* at 109-10 (remarks of McFerrin Smith).

231. *Id.* at 111 (remarks of William Hyde).

inquire into an agency's compliance with an indexing requirement when a performance audit of the agency was conducted.²³² A third idea was to require agencies to report directly to their legislative oversight committees the extent of their compliance or noncompliance with an indexing requirement. Apparently this last idea came from an agency person in the group who offered this explanation: "agencies are particularly moved by what their own particular legislative oversight committee thinks."²³³

It appears that both the small group discussions and the reports to the plenary session were adversely affected by two planning mistakes. The first mistake was putting the subject matter index item so far down on the agenda that it was not reached until people were tired and time was short. The second mistake was not including the text of the Senate proposed committee bill in the written materials distributed to all participants. A copy was available for each small group, but that was not adequate. I take responsibility for both mistakes. While the Conference did not go on record supporting the Senate bill, many of the suggestions and recommendations that were offered by the participants were included in the proposed committee bill.²³⁴ And the Conference certainly underscored the need for legislative attention to be given to the subject matter index question.

Senate Proposed Committee Bill 90-6 was introduced after the Conference concluded. It ultimately became Committee Substitute for Senate Bill 2550. The bill was reported out of the Senate Governmental Operations Committee, but it was pulled into the Senate Committee on Appropriations where it died upon adjournment sine die of the 1990 regular session.²³⁵

V. CONCLUSION

The Seventh Administrative Law Conference addressed Florida's major current rulemaking process concerns. The participants generally were not inclined to change or to modify those aspects of the process that legitimately could be viewed as contributing to the complexity of the process. Consequently, there was general agreement that the 120.54(17) drawout provisions should not be disturbed. If the rulemaking process ought to be simplified at all, it was generally agreed that the economic impact statement requirement for all rules by all

232. *Id.* at 112 (remarks of William Hyde).

233. *Id.*

234. *Id.* at 114-15 (remarks of Patricia Dore).

235. FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, HISTORY OF SENATE BILLS at 204, CS for SB 2550.

agencies was ripe for legislative reconsideration. Even at the risk of further complicating the rulemaking process, there was substantial support for the notion of requiring republication of notice when an agency makes substantial changes to the text of a proposed rule after the initial notice is published. Most participants were satisfied with the operation of the JAPC.

The two most pressing problems—controlling abuses of policy making through adjudication and access to and availability of final orders—drew mixed reactions. Participants generally agreed that both were serious concerns in need of legislative attention, but they did not agree that the pending legislative proposals were the best ways of dealing with the problems. Perhaps it was in these two areas that Conference participants had the most influence. Neither bill was enacted into law during the 1990 legislative session. But the problems have not gone away, and it is predictable that some variation of both bills will resurface during the 1991 session. It can be hoped that both problems will seem less intractable because of the Conference participants' efforts to improve the legislative responses to them.

