



THE FLORIDA LEGISLATURE



JOINT ADMINISTRATIVE PROCEDURES COMMITTEE

Report on Unadopted Rules *FEBRUARY 2006*

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REPORT ON UNADOPTED RULES

EXECUTIVE SUMMARY

The Administrative Procedure Act should not be amended in the 2006 legislative session to address unadopted rules. While the use of unadopted rules directly impacts Florida's citizens, the extent and cause of the problem is unclear. The Joint Administrative Procedures Committee should continue to identify unadopted agency rules, determine the reasons these rules have not been adopted, and then draft any recommended legislative changes to the Act.

Throughout the history of Florida's APA, the Legislature has consistently expressed its preference that agencies adopt their policy statements through the rulemaking procedures of the Act. The rule adoption process provides public notice and the opportunity to participate, and ensures legislative oversight of delegated legislative authority. The courts have tended to afford more discretion to agencies in whether or not to adopt policy statements as rules, and they have also narrowed and created exceptions to the definition of a rule. The Act has been amended several times over the years in an attempt to reassert the legislative intent that agencies must adopt their policies pursuant to the requirements of Chapter 120.

Examples of unadopted rules were documented to illustrate the nature and scope of the issue. The committee sought input from a diverse group of stakeholders in the administrative process to assess the impact of unadopted rules and determine whether current provisions of the Act provide sufficient incentives for agencies to adopt rules. There was no consensus on the extent or cause of the problem, consistent with the committee's conclusion that more time is needed to monitor the use of unadopted rules and explore possible legislative remedies.

Research and discussions with interested persons suggest several approaches to address unadopted rules that warrant further consideration. These include amending the definition of a "rule," strengthening the unadopted rule challenge provisions of the Act, and creating a new category of agency policy exempt from rulemaking but subject to less burdensome requirements. Each of these approaches should be more fully developed before their relative merits can be evaluated.

As part of its continuing study of unadopted rules, the committee is taking some additional actions. Agencies will be contacted at prescribed intervals to ascertain the status of mandatory rulemaking activities contained in new legislation. News sources will be monitored to learn of agency statements of policy that may require adoption as rules. Information published on agency web sites will be reviewed to determine if any statements of policy should be adopted as rules.

The committee will prepare a supplemental report of additional findings and recommendations necessary to fully address possible legislative solutions to the problem of unadopted rules.

BACKGROUND AND PRESENT SITUATION

Legislative and Case Law History

Florida's 1974 Administrative Procedure Act (APA) was intended to combat the perception of "phantom government," the idea that agency policies were neither widely known nor consistently applied. Important goals of the new Act were to provide public notice of agency policy, encourage public participation in the formulation of that policy, and ensure legislative oversight of delegated authority. Agency policy was to be expressed through rules adopted pursuant to the rulemaking requirements of the Act. Although one purpose of the Act was to require agencies to adopt their policies as rules, the 1974 legislation did not prescribe when rules had to be adopted.

The judicial response to the amended Act initially was somewhat mixed. Two early cases decided by the Florida Supreme Court expressed the view that agencies may be authorized to make and enforce policy decisions without going through the formal rulemaking process.¹ However, shortly thereafter in *Straughn v. O'Riordan*, 338 So.2d 832 (Fla. 1976), the court found that the Department of Revenue's informal policies for evaluating sales tax applications constituted rules and could not be enforced without formal adoption under the procedures set forth in Chapter 120. Following the reasoning of the *Straughn* opinion, the First District Court of Appeal expressed its preference for agency rulemaking in *Department of Administration v. Stevens*, 344 So.2d 290 (Fla. 1st DCA 1977). Department policies and directives relating to the laying off of employees were invalidated because they were not adopted through formal rulemaking procedures. The court reasoned that these policies constituted "rules," as they affected both the private interests of employees and procedures important to the public, were generally applicable, and had the force of law. Other decisions followed this approach.²

The cases allowed an affected person to challenge the validity of unadopted rules as an incentive to compel agencies to use the rulemaking process. If the policy was found to be a "rule" as defined in the Act, and it had not been adopted as a rule pursuant to the prescribed rule adoption procedures, the policy was invalidated and could not be used as the basis for agency action until it was properly adopted.

¹ See *Tamiami Trail Tours, Inc. v. Bevis*, 316 So.2d 257 (Fla. 1975); *City of Plant City v. Mayo*, 337 So.2d 966 (Fla. 1976).

² See, e.g., *Price Wise Buying Group v. Nuzum*, 343 So.2d 115 (Fla. 1st DCA 1977)(agency statement contrary to existing rule was invalid because not adopted through rulemaking).

After these decisions invalidating the use of unadopted policy, the court created a significant exception in *McDonald v. Department of Banking and Finance*, 346 So.2d 569 (Fla. 1st DCA 1977). The court held that state agencies are not required to adopt all of their emerging or incipient policies as rules. It recognized the existence of circumstances in which it might be beneficial to postpone formal rulemaking until an emerging policy was further refined. The court reasoned that it was possible for an emerging policy to be developed through the experience presented by individual cases. After the policy had been applied and sharpened in adjudicatory proceedings, it could then be adopted as a rule. While acknowledging that the APA did not explicitly require agencies to make rules of all policy statements of general applicability, *McDonald* also embraced the importance of adopting rules pursuant to the established procedures to maintain the vitality and original purpose of the Act. In fact, the *McDonald* decision itself invalidated some of the unadopted rules that were before the court because they did not meet the “incipient policy” exception.

While courts continued to invalidate unadopted rules in many circumstances,³ other cases gradually expanded the *McDonald* exception, with several courts eventually concluding that whether an agency promulgated a rule to announce its policy was simply a matter of agency discretion. One of the most significant cases to promote this view was *Florida League of Cities, Inc. v. Administration Commission*, 586 So.2d 397 (Fla. 1st DCA 1991).⁴ In rejecting arguments that a sanctions policy adopted by the Commission constituted rules which must be adopted pursuant to the requirements of the Act, the court stated that “[r]ulemaking cannot be forced upon an agency and its policy may be developed, at the agency’s choice, through the adjudication of individual cases.” 586 So.2d 397, 406. As noted by legal commentator and law professor Pat Dore, “[b]efore long . . . the limited McDonald exception swallowed the rule,” because courts “allowed the agencies themselves to decide whether and when they were ready to proceed to rulemaking.”⁵

The concept that rulemaking was a matter of agency discretion threatened a return to the days of “phantom government,” and prompted the Legislature to take action. In response to *McDonald* and the cases that had expanded the exception it created, the Legislature in 1991 unequivocally stated its preference for agency rulemaking. Section 120.535 clearly stated that “[r]ulemaking is not a matter of agency discretion,” and required agencies to adopt their policies through rulemaking as soon as “feasible and practicable.”⁶ The

³ See, e.g., *Dept. of Administration v. Harvey*, 356 So.2d 323 (Fla. 1st DCA 1978); *McCarthy v. Dept. of Insurance*, 479 So.2d 135 (Fla. 2d DCA 1985); *Dept. of Transportation v. Blackhawk Quarry Co.*, 528 So.2d 447 (Fla. 5th DCA 1988).

⁴ See also *City of Tallahassee v. Florida Public Service Commission*, 433 So.2d 505 (Fla. 1983); *Florida Cities Water Co. v. Florida Public Service Commission*, 384 So.2d 1280 (Fla. 1980); *Rabren v. Department of Professional Regulation*, 568 So.2d 1283 (Fla. 1st DCA 1990) (stating “[b]y now it is well established that the choice between rulemaking and adjudication is largely left to the agency.”); *Florida Public Service Commission v. Central Corp.*, 551 So.2d 568 (Fla. 1st DCA 1989).

⁵ Patricia A. Dore, *Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 Fla. St. U. L. Rev. 437 (1991).

⁶ Section 120.535(1), F.S. (1991). (Note: Section 120.535(1) was renumbered as 120.54(1) in 1996.)

burden to prove that rulemaking was not feasible or practicable was placed on the agency. The agency could demonstrate that rulemaking was not feasible if:

1. The agency had not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or
2. Related matters were not sufficiently resolved to enable the agency to address a statement by rulemaking; or
3. The agency was currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.⁷

The statute also created a presumption that rulemaking was practicable. The agency could rebut that presumption by proving that:

1. Detail or precision in the establishment of principles, criteria, or standards for agency decisions was not reasonable under the circumstances; or
2. The particular questions addressed were of such a narrow scope that more specific resolution of the matter was impractical outside of an adjudication to determine the substantial interests of a party based upon individual circumstances.⁸

Section 120.535 was designed to ensure that all agency rules would be adopted, except for the few specifically delineated exceptions. Agencies were not foreclosed from developing their policies through adjudication; however, once developed, section 120.535 affirmatively required the policies to be formally adopted through rulemaking.

Along with section 120.535, the 1991 Legislature enacted section 120.57(1)(b)15., which authorized agencies to rely on unadopted policy so long as the agency could “prove up” the policy when it was applied. An agency could rely on the unadopted policy even if it was challenged under section 120.535, or if it had been determined to violate section 120.535(1) if the agency had initiated the rulemaking process to formally adopt the policy as a rule.

Although section 120.535 was designed to ensure that agency policies were codified as rules once they were sufficiently developed, some viewed the 1991 legislation as lacking sufficient incentives to compel agency rulemaking.⁹ Because an agency could continue to rely on an unadopted policy statement in subsequent adjudicatory proceedings during the rulemaking process, the agency was not penalized for failing to initiate rulemaking as soon as the policy was fully developed. In addition, attorneys’ fees could be awarded only where an agency statement or policy previously determined to violate section 120.535(1) was relied upon by the agency to determine a person’s substantial interests,

⁷ *Id.*

⁸ *Id.*

⁹ Stephen T. Maher, *Administrative Procedure Act Amendments: The 1991 and 1992 Amendments to the Florida Administrative Procedure Act*, 20 Fla. St. U. L. Rev. 367 (1992).

and the agency had not initiated the rulemaking process to formally adopt the policy as a rule.

In 1996, the Administrative Procedure Act was substantially reorganized, and several amendments relating to unadopted rules were enacted. First, a new procedure by which an affected person could petition an agency to initiate rulemaking for an existing rule that had not been adopted pursuant to the requirements of Chapter 120 was included in section 120.54(7). The agency was required to either initiate rulemaking or provide notice that the agency would hold a public hearing on the petition. The purpose of the public hearing was to receive public comments on the unadopted rule and to “consider whether the public interest is served adequately by the application of the rule on a case-by-case basis, as contrasted with its adoption by the rulemaking procedures or requirements [of the Act].”¹⁰ Within 30 days after the public hearing, the agency was required to either initiate rulemaking or publish a statement of its reasons for not doing so.¹¹ While this provision clearly was designed to encourage agencies to adopt their policies as rules, it did not force agencies to go to rulemaking.

Second, while the procedures to challenge an unadopted rule remained substantially unchanged, the legislation provided for an award of attorneys’ fees and costs to a person who successfully challenged the agency’s failure to formally adopt a policy as a rule.¹² The agency could avoid payment of attorneys’ fees and costs by initiating the rulemaking process after a challenge had been filed but before the administrative law judge issued a final order on the challenge.¹³

Finally, the Legislature specifically described the elements that an agency must “prove up” if it was to be allowed to apply an unadopted rule in a substantial interests hearing, which were substantially similar to the standards applied in rule challenge proceedings.¹⁴ The 1996 legislation also restricted the agency’s ability to reject the administrative law judge’s finding that the agency failed to prove up the policy.¹⁵

There were other significant amendments in 1996 that also may have had an indirect effect on unadopted rules. The Legislature revised the rulemaking standard in the Act to curtail agency rulemaking authority. New section 120.536(1) provided that a grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule. A specific law to be implemented is also required. An agency may only adopt rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. This provision was intended to prevent an agency from adopting a rule that was based only on its general rulemaking authority and not on a specific statute to be implemented. Section 120.536(1) further provided that no agency shall have the authority to adopt a rule only because it is reasonably related to the purpose of the

¹⁰ Section 120.54(7)(b), F.S. (1996).

¹¹ Section 120.54(7)(c), F.S. (1996).

¹² Section 120.595(4)(a), F.S. (1996).

¹³ Sections 120.56(4)(d), 120.595(4)(a), F.S. (1996).

¹⁴ Section 120.57(1)(e)2., F.S. (1996).

¹⁵ Section 120.57(1)(e)3., F.S. (1996).

enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Finally, the provision stated that statutory language which grants rulemaking authority or which generally describes the powers and functions of an agency is to be construed to extend no further than the particular powers and duties conferred by that same statute. To be certain that its intent to limit agency rulemaking authority was clear, the Legislature added identical language to section 120.52(8), which sets forth the definition of an invalid exercise of delegated legislative authority. These amendments rejected the judicially created test that rules would be upheld so long as they were reasonably related to the purpose of the enabling legislation and were not arbitrary or capricious.¹⁶

The court interpreted the new 1996 rulemaking standard in *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So.2d 72 (Fla. 1st DCA 1998). The First District construed the term “particular” in sections 120.52(8) and 120.536(1) to restrict rulemaking authority to matters “directly within the class of powers and duties identified in the enabling statute.”¹⁷ Under this interpretation of the new standard, the court upheld rules proposed by the water management district as a valid exercise of delegated legislative authority.

In the legislative session immediately following the *Consolidated-Tomoka* decision, the Legislature amended the Act to clarify the standard for rulemaking and expressly reject the judicial “class of powers and duties” test. The 1999 legislation removed the term “particular” and included a provision stating that an agency does not have authority to adopt a rule only because it is “within the agency’s class of powers and duties.”¹⁸

It is not clear, however, whether these 1996 rulemaking restrictions had their intended effect of eliminating agency policies not supported by specific agency powers and duties. What is clear is that the average number of rules adopted each year significantly declined. In the decade preceding the 1996 amendments (1986 – 1995), on average 4,697 rules were adopted each year. In the following decade (1996 – 2005), on average only 3,271 rules were adopted each year.¹⁹ While it may be that the number of adopted rules declined because agencies eliminated agency policies not firmly grounded in specific powers and duties, it is also possible that more agency rules have remained unadopted. It seems unlikely that agency counsel would conclude that authority for a rule could be expanded by the simple expedient of failing to adopt it according to prescribed procedures. However, it is not hard to imagine that some agency personnel might prefer

¹⁶ *General Telephone Co. of Florida v. Public Service Commission*, 446 So.2d 1063 (Fla. 1984); *Department of Labor and Employment Security v. Bradley*, 636 So.2d 802 (Fla. 1st DCA 1994); *Florida Waterworks Association v. Public Service Commission*, 473 So.2d 237 (Fla. 1st DCA 1985); *Department of Professional Regulation v. Durrani*, 455 So.2d 515 (Fla. 1st DCA 1984); *Agrico Chemical Co. v. Department of Environmental Regulation*, 365 So.2d 759 (Fla. 1st DCA 1978); *Florida Beverage Corp. v. Wynne*, 306 So.2d 200 (Fla. 1st DCA 1975).

¹⁷ *Consolidated-Tomoka*, 717 So. 2d at 79.

¹⁸ Section 120.536(1), F.S. (1999).

¹⁹ Rule actions include new rules, amendments, and repeals. Detailed information is on file at the Committee.

to simply issue a “directive” rather than engage in rulemaking and risk confirmation of their fear that the policy might lack sufficient statutory authority. Most likely, the reduction in rules reflects both of these explanations in part. If so, the 1996 rulemaking restrictions may have increased the number of unadopted rules.

The Definition of a “Rule” in the APA

Since 1974, a “rule” has been defined as an agency statement of general applicability that implements, interprets or prescribes law or policy. An agency statement need not be reduced to writing to be a rule.²⁰ It is the effect of the agency policy statement rather than the agency’s own characterization of its action that determines whether the statement is a rule.²¹ For example, a declaratory statement that the agency’s prior interpretation of its rule was without statutory authority was found to be a rule “because it is an agency statement of general applicability that implements, interprets and prescribes law or policy.”²² The term “rule” also includes agency statements describing the procedure and practice requirements of the agency. Agency forms imposing requirements or soliciting information not specifically mandated by statute or by an existing rule are included within the definition. The definition expressly provides that the term also includes the amendment or repeal of a rule.

The statutory phrase “general applicability” has been judicially construed to mean only those statements that are “intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law,” and affording agency personnel no discretion not to apply the agency statement.²³ This judicial interpretation places two significant limitations on the definition of a rule. First, agency statements affecting substantial interests that do not rise to the level of legal rights are not rules. Second, if application of the agency statement is discretionary, it is not a rule.²⁴ Where discretion exists as to *how* the policy will be applied, but the policy is applied in all circumstances, the policy is generally applicable.²⁵

The courts have carried the “interests vs. rights” distinction to the interpretation of statutory exceptions as well. An agency relying on the internal management memorandum exception to rulemaking requirements must prove first, either that the memorandum does not affect the private interests of any person or that it does not affect the interests of the public, and second, that it has no application outside the agency issuing the memorandum.²⁶ In *Department of Revenue v. Novoa*, 745 So.2d 378 (Fla. 1st DCA 1999), the court restricted the meaning of “private interest” solely to an interest protected by a legal right.

²⁰ *Department of Highway Safety and Motor Vehicles v. Schluter*, 705 So.2d 81 (Fla. 1st DCA 1998).

²¹ *Department of Administration, Division of Personnel v. Harvey*, 356 So.2d 323 (Fla. 1st DCA 1977).

²² *Price Wise Buying Group v. Nuzum*, 343 So.2d 115 (Fla. 1st DCA 1977).

²³ *McDonald v. Department of Banking and Finance*, 346 So.2d 569 (Fla. 1st DCA 1977); *Department of Administration v. Stevens*, 344 So.2d 290 (Fla. 1st DCA 1977).

²⁴ *Schluter*, 705 So.2d at 82.

²⁵ *Kerper v. Department of Environmental Protection*, 894 So.2d 1006 (Fla. 5th DCA 2005).

²⁶ Section 120.52(15)(a), F. S. (2005).

Unadopted Rules and Nonrule Policy

The APA definition of a “rule” in 120.52(15) is a functional one, not a procedural one. That is, the procedure used to develop a statement of policy, or its subsequent designation as a “rule,” “memorandum,” “guidance document,” or “manual” is not determinative of whether or not it meets the definition. Rather, an agency statement is a rule depending upon how it *functions*. In another section the Act goes on to expressly provide²⁷ that any agency statement which meets the definition of a rule shall be adopted through the prescribed rulemaking procedures. Logically, therefore, if a rule is not so adopted, the statement does not cease to be a rule, it simply becomes an “unadopted rule” in violation of the Act’s requirements.

The lack of a statutory definition of the terms “unadopted rule” and “nonrule policy” may have contributed to the uncertainty over what agency policy must be promulgated through the rulemaking procedures of Chapter 120. The terms have not been used consistently. The term “unadopted rule” frequently has been used by courts and commentators as described above, but other terms, such as “policy,” “nonrule policy,” “incipient policy,” and “incipient rulemaking” have also been used.²⁸ Unadopted rules have also been referred to as “nonadopted rules.”²⁹

The term “nonrule policy” is especially confusing, and appears to mean different things to different people. Nonrule policy is sometimes used to mean agency policy that does not meet the *definition* of a rule. Thus, “[p]olicy included in the statutory definition [of a rule] was policy-by-rule. Policy excluded from the statutory definition was nonrule policy.”³⁰ Nonrule policy at other times is used to mean any agency policy that has not been *adopted* as a rule.³¹ The difference is important, because there is clearly a category of agency policy that meets the definition of a rule, but which has not been adopted. This last category would be included in the latter definition, but not the former definition.

While the term “nonrule policy” is not used in the Florida Statutes, it has often appeared in cases and commentary. Statutory definition of terms such as “unadopted rule” and “nonrule policy,” and most importantly, clarification of how each of various categories of policy is to be treated under the Act, might help dispel any misunderstanding of which policies must be adopted as rules.

²⁷ 120.54(1)(a), F.S.

²⁸ Sam Power, *Apples and Oranges: Kerper v. Department of Environmental Protection*, Administrative Law Section Newsletter, June 2005.

²⁹ *Department of Highway Safety and Motor Vehicles v. Schluter*, 705 So.2d 81 (Fla. 1st DCA 1997).

³⁰ Daniel Manry, *The Scarecrow in McDonald’s Farm: A Fairy Tale About Administrative Law*, 73 Florida Bar Journal 60, March 1999.

³¹ *Gopman v. Department of Education*, 908 So.2d 1118 (Fla. 1st DCA 2005)(policy of general applicability not adopted through rulemaking was “non-rule” policy).

METHODOLOGY

The committee staff conducted legal research of judicial decisions and legislative history to trace the evolution of unadopted rules in Florida's Administrative Procedure Act. Provisions of the federal act and those of other states which address the treatment of agency policy statements were surveyed for comparison to Florida's act. This research also was useful in developing possible approaches for future legislative consideration.

Instances of unadopted agency policy were documented which help to illustrate the nature and scope of the issue of unadopted rules in agency practice. Although the committee has not undertaken a focused search to identify cases of unadopted rules, many instances have been brought to the committee's attention by members, legislative staff and citizens. The committee also has learned of unadopted agency policies through the rule review process and examination of agency web sites. The following examples are representative of the types of unadopted rules the committee has encountered:

1. Eligibility requirements and qualifications, application, exception criteria and procedures for HIV/AIDS Patient Care Programs operated by the Department of Health to serve low income persons living with HIV have been in use by the department for many years without the benefit of Chapter 120 rulemaking. The department recently published a notice of proposed rulemaking; however, the rules have not been adopted because of questions regarding statutory authority for some of the requirements.
2. Numerous provisions of Chapters 984 and 985, Florida Statutes, require the Department of Juvenile Justice to adopt rules relating to standards for mental health services in residential treatment programs, juvenile educational and career-related programs, and personnel training requirements, as well as other programs and services. The majority of these statutory provisions have been in existence for a number of years, but very few rules have been adopted.
3. The Road to Independence Act, enacted in October 2002, requires the adoption of rules by the Department of Children and Family Services to implement provisions relating to services available to young adults transitioning from foster care. In early 2005, the committee received reports of the department's implementation of these provisions through unadopted rules. After several inquiries from the committee, the department published a notice of proposed rulemaking in October 2005. The rules have not yet been adopted because a DOAH proceeding challenging the rules as an invalid exercise of delegated legislative authority has been filed.
4. The Department of Health, Division of Medical Quality Assurance, requires the use by its employees of an unadopted policy manual

containing standards and procedures for the evaluation and referral of complaints, including referrals to the state attorney for criminal prosecution. The committee is currently engaged in discussions with the department to determine whether all or part of the manual should be formally adopted as a rule.

The committee solicited the views of private law practitioners, administrative law judges, state agency counsel, and legislative staff to help determine the extent of the problem with unadopted rules and to seek recommendations for possible legislative solutions. A meeting of interested persons was held on July 27, 2005, for an exchange of ideas and suggestions to address the use of unadopted rules. The consensus of the participants was that existing provisions of Chapter 120 appear to be working reasonably well. While several suggestions were made, there was no agreement on what amendments might improve the Act. The committee also met with representatives of legal services organizations to assess the impact of unadopted rules on their clients. All of these discussions were helpful in developing the proposals for future consideration described in the following section.

PROPOSALS FOR FUTURE CONSIDERATION

Some of the suggested approaches to amend the Administrative Procedure Act to address unadopted rules merit discussion. The first approach is simply to amend the definition of “rule.” A second approach would strengthen the unadopted rule challenge provisions of the Act. The third approach would create a new category of agency policy exempt from rulemaking but subject to new, less cumbersome requirements. For purposes of the conceptual discussion here, some related ideas have been combined or reformulated, and these three approaches do not precisely reflect the specific suggestion of any single person.

1. Amend the APA’s Definition of “Rule”

Any proposal for legislative change to address the treatment of unadopted rules directly or indirectly involves the APA’s definition of “rule.” As noted earlier, “unadopted rules” are created when an agency statement meets the functional definition of a rule but has not been adopted through the rulemaking procedures.

There is a certain “cost/benefit” calculation that must be made by the Legislature in determining the proper scope of required rulemaking. Rulemaking is necessarily cumbersome and agencies almost always would prefer not to do it. On the other hand, rulemaking provides benefits such as public participation, legislative oversight and judicial review. If the Legislature defines “rule” too broadly, costs will unnecessarily increase, with little corresponding increase in public benefit. If the Legislature defines “rule” too narrowly, important benefits of rulemaking will be lost for comparatively little

cost savings. The question for any given type of policy statement is whether the benefits of rulemaking outweigh its costs.

The definition of a rule in Florida's APA is a very broad one that has been narrowed in several respects by judicial interpretation. One suggestion to amend the definition of a rule is to codify these judicial interpretations, on the theory that the courts have drawn the line in the appropriate place, but the interpretations are not apparent on the face of the statute. Otherwise, the definition might be either narrowed or broadened. It might be narrowed to exclude certain policy statements to the extent that the Florida Administrative Code now contains rules that meet the definition of rule but for which the rulemaking process served no real public purpose. It might be broadened to include other policy statements not presently included in the definition of a rule but for which rulemaking would be desirable. The difficulty would be to identify types of policy statements that fit these conceptual categories and develop statutory criteria to precisely describe them.

It was suggested that procedural rules might be reasonably excluded from the definition. Other suggestions involved consideration of judicial interpretations of the terms "general applicability," "guidance documents," and "affecting rights," as well as a review of the existing statutory exclusions to ensure that each is in the public interest.

2. Amend the Unadopted Rule Challenge Provisions

Section 120.56(4), F.S., provides that any person substantially affected by an agency statement may seek an administrative determination that the statement violates the rulemaking requirements of section 120.54(1), F.S. That section provides that rulemaking is not a matter of agency discretion and requires that each agency statement defined as a rule by section 120.52(15) be adopted as soon as feasible and practicable. Under current provisions, an agency may continue to apply a challenged unadopted statement to the petitioner until the administrative law judge enters a final order that the statement violates section 120.54(1). Since initiation of rulemaking in response to an unadopted rule challenge essentially acts as a complete defense, an agency may avoid an adverse ruling simply by engaging in belated rulemaking.

Proponents of amending the unadopted rule challenge provisions argue that the current statute provides no incentive for agencies to adopt policy as a rule until such time as a challenge is filed, as there is no "penalty" for failing to adopt the rule earlier. They argue that the statute likewise provides no incentive for an affected person to take the time and expense to challenge an unadopted rule, since whether or not this is done, the policy can still be applied to the person if the agency subsequently initiates rulemaking. Similarly, attorneys' fees and costs are available to the petitioner only if a final order is issued, not if the agency initiates rulemaking. The courts also have found that no fees and costs are available under the statute if the agency initiates rulemaking, but ultimately it is determined that the agency has no authority for the rule.³² In general, it has been

³²*Osceola Fish Farmers Assn. v. Division of Administrative Hearings*, 830 So.2d 932 (Fla. 4th DCA 2002).

suggested that the relationship between the provisions of section 120.56(4), which allow for challenges to unadopted rules, and those of section 120.57(1)(e), which allow an agency to “prove up” unadopted rules, needs clarification and cross-referencing to properly convey a coherent legislative scheme with respect to unadopted rules.

The most extreme amendment to the rule challenge provisions would repeal the “prove up” provisions of section 120.57(1)(e) and replace them with a prohibition on the introduction of any agency policy statement that met the definition of a rule, but which had not been adopted. The agency would be required to demonstrate that a given fact situation was governed by existing statute or rule. An agency could still argue any reasonable interpretation of these existing legal authorities, but could introduce no evidence of any unadopted rule with respect to such interpretation.³³

A more limited effort in the same direction might forbid an agency from using the “prove up” provisions upon the filing of an unadopted rule challenge. The section 120.57 proceeding could continue with application of agency policy not contained in statute or adopted rule only when the section 120.56(4) proceeding concluded that the agency policy did not constitute a rule, the section 120.56(4) proceeding was voluntarily dismissed, or an adopted rule became effective. Adoption of a rule in the midst of a substantial interest hearing, either in response to an administrative law judge’s ruling or voluntarily, would involve significant delay, and thus be an incentive for an agency to adopt policies before being compelled to do so by initiation of section 120.56(4) proceedings. The section 120.56(4) remedy could itself be made more effective by allowing the award of attorneys’ fees and costs to the petitioner unless the administrative law judge determined that the policy did not constitute a rule or the proceeding was voluntarily dismissed. Alternatively, or in addition, the statute could forbid application of the challenged policy to the petitioner unless and until these same results were achieved.

These amendments to the rule challenge provisions would increase both incentives for petitioners to file unadopted rule challenge proceedings and incentives for agencies to adopt rules prior to the initiation of proceedings.

3. Amend the Rule Adoption Procedures of Chapter 120

Florida’s approach to unadopted rules differs from the approach followed by the federal government and several of the states. While the broad federal definition of “rule” is virtually synonymous with Florida’s definition, there are essentially three different adoption procedures which may be applicable under the federal APA, perhaps best distinguished by the level of citizen participation that each permits. First, there is formal rulemaking, a procedure maximizing citizen participation and requiring full evidentiary hearings, which can take years to complete. It is seldom required. Second, there is the basic “notice and comment” rulemaking, less structured than Florida’s procedure but, as its name suggests, allowing some citizen participation. Finally, there is a third category

³³ This in fact may have been the intent of some of the early court cases describing the “prove up” option as an incentive to rulemaking, but the historical admission of evidence as to agency policy not contained in rule, and certainly the existing provisions of 120.57(1)(e), F.S., established a different approach.

including several subjects³⁴ covered by the definition of rule, but exempted from the other two rulemaking procedures, requiring only notice in the Federal Register and allowing no citizen participation.

Some proponents of amendments to change Florida's rulemaking provisions suggest that the failure to enforce required rulemaking needs a two-pronged solution. First, rulemaking should be made easier. This might be done in several ways: steps could be removed from the rulemaking process that every rule must now follow; a second streamlined rulemaking procedure could be created for certain types of rules; or a category of rules could be completely exempted from rulemaking, providing they are properly noticed. Second, the categories and their attendant procedures would then need to be strictly enforced.

A streamlined rulemaking process might eliminate rule development; negotiated rulemaking; statements of estimated regulatory cost; federal standards statements; small business, county, and city statements; or some of the points of entry to file rule challenges. The argument is that it would then become easier to adopt rules, and agencies would respond by adopting many or most of their unadopted rules.

Some of the cumbersome requirements deemed necessary for some rules might be eliminated for others. Rules dealing only with procedures, or those deemed noncontroversial, might be exempted from some requirements. Florida's APA currently exempts procedure or practice rules from the public hearing requirement, and has streamlined procedures for emergency rules and rules adopting federal standards. Similar provisions could be used to provide "fast track" processes for other rules as well, if they could be carefully defined.

A suggestion to create a category of rules completely exempted from rulemaking requirements is based on the interpretive rule procedures followed under federal law, particularly for "safe harbor" rules. Under this system, an agency would be free to issue interpretive rules that are binding on the agency, but not on the public, through simple publication in the Florida Administrative Weekly. Such a "safe harbor" rule would represent an agency's statement of one acceptable way to meet a statutory requirement. The agency would be bound to find compliant anyone following the suggested interpretation, but a citizen would always be free to try to convince the agency that the statutory requirement had been met through other means. The argument is that because the vast majority of citizens would simply comply with the agency's interpretation even though not legally required to do so, the agency could prioritize its resources for review of other citizen activity inconsistent with the interpretive rule, but asserted by the citizen to meet the statutory requirement. The federal system has developed not only different adoption procedures for legislative and interpretive rules, but different methods of challenge and standards of judicial review.

³⁴ Categories covered by the federal definition of rule but nevertheless exempt from rulemaking include matters relating to agency organization, procedure, or practice; agency management or personnel; public property, loans, grants, benefits, or contracts; interpretive rules; and general statements of policy.

The creation of a category of rules exempted from rulemaking requirements would not be sufficient on its own to address unadopted rules. Issues would naturally arise as to the boundaries of each category and the appropriate treatment of each type of rule in various contexts. These are significant challenges. In the federal courts, there is frequent litigation at all levels as to the appropriate treatment of any given agency statement. The case of *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), was a federal administrative law case centered on whether a rule was interpretive or not, and the appropriate standard of review to be applied. It is the most recent of several cases that have gone to the Supreme Court and resulted in split opinions. Florida's APA would require significant revision, not only to establish appropriate procedures and standards to govern treatment of interpretive rules, but also to precisely define each category of rule and provide adequate agency incentives to comply with the procedures for each category. This approach therefore would be likely to involve elements of the two other approaches outlined above.

CONCLUSION AND RECOMMENDATION

Florida's Administrative Procedure Act should not be amended in the 2006 legislative session to address concerns with unadopted rules. While the committee has identified numerous policies that appear to meet the definition of a "rule" but have not been adopted through the rulemaking process, there is no immediately obvious statutory solution. Prior to the 2007 session, the committee should continue to identify unadopted rules, analyze the reasons these rules may not have been adopted, consider and refine statutory approaches, and draft any recommended amendments.

While the committee's attention to unadopted rules within the last few months suggests that there are numerous instances of unadopted rules, it may not follow that legislative action of any kind is necessarily required. The consensus of those who participated in the unadopted rules meeting was that the existing challenge provisions of Chapter 120 are working reasonably well. Private counsel noted that the Act's provisions give them leverage to approach an agency when unadopted policies affect their clients, and so effect specific accommodation or prompt rulemaking. Agency counsel suggested that few unadopted policies exist, but also suggested that with respect to many policies that technically should be adopted as rules, very few members of the public seem to be concerned. The meeting consensus was that the system works fairly well when someone is concerned enough to invoke the challenge provisions of the Act. This position is generally supported by Division of Administrative Hearings statistics, which do not show an increase in the filing of unadopted rule challenges.

On the other hand, as one administrative law judge suggested, it may be that, "It's only an adequate remedy for the well-heeled. It's not an adequate remedy for the people for whom the APA was intended."³⁵ This conclusion might be supported by the fact that

³⁵Comments of Judge Daniel Manry, July 27, 2005, meeting on unadopted rules.

many of the instances of unadopted rules identified by the committee involve agencies performing “service” rather than “regulatory” roles.³⁶ The beneficiaries of these unadopted policies generally may be less aware of APA requirements and may be less likely to be represented as agency policy is developed and applied. The judge estimated that 20–30 percent of his substantial interest hearings involved the application of unadopted agency policy, although no DOAH statistics are available to confirm this estimate. If one of four agency actions that result in a formal hearing requires application of unadopted agency policy, this suggests that it may in fact be quite prevalent. If the legislative determination that agency policy should be adopted as rules is enforced only in response to formal challenge proceedings — or the threat of them — it might be argued that the existing statutory provisions should be reworked to motivate agencies to take a more active role in meeting the statute’s requirements. Perhaps other mechanisms to encourage compliance could be developed. However achieved, more consistent agency compliance could foster the generally recognized benefits of rulemaking, including more deliberative agency policy-making, legislative oversight, and increased public awareness and participation.

Any amendments would need to address the underlying reasons that policies are not being adopted. These reasons are not apparent. It may be that the definition of a “rule” as interpreted by the courts is unclear. If so, it may be that a simple rewrite of the statutory definition of “rule,” clearly exempting some policies or clarifying legislative intent as to exactly which agency statements constitute rules, is the only amendment required. Or, if there is no real ambiguity or misunderstanding of the requirements of the Act, but instead it appears that key agency personnel implementing agency policy are simply unaware of the Act’s requirements, a different approach may be indicated. Finally, if the requirements are actually well known, but agencies are not in compliance for other reasons, a more comprehensive approach involving “incentives and disincentives” may be in order. Incentives might include simplifying the rulemaking process or creating a “fast track” for uncomplicated or noncontroversial rules. Disincentives might take the form of required public notice or legislative review of unadopted policies, increased penalties or attorneys’ fees, or removal or curtailment of the ability of agencies to prove up unadopted rules in adjudicatory proceedings.

The committee will continue its study of unadopted rules to better determine the scope of the problem, identify reasons behind the failure to adopt rules, and determine the best approach for statutory amendments, if necessary. Historically, the committee has reviewed only those unadopted policies called to its attention by citizens, members, or substantive committees. As part of this extended study of unadopted agency policy, the committee is taking several additional actions:

Notification of mandatory rulemaking duties in new legislation. The committee has routinely notified each agency of new legislation affecting the agency’s duties and responsibilities following each legislative session.

³⁶Many instances of unadopted rules noted by the committee involve agencies such as the departments of Health, Juvenile Justice, and Children and Family Services, which provide services or benefits to generally disadvantaged constituencies.

To help ensure that agencies adopt rules within the 180-day time period contained in section 120.54(1)(b), F.S., the committee has now established a procedure to contact agencies after 90 days and at the end of the 180-day period to ascertain the status of mandatory rulemaking activities.

Monitoring news reports of agency actions. The committee will monitor select news sources to learn of agency statements of policy that may require adoption as rules. The agency will be contacted to determine whether rulemaking is required.

Review of agency web sites. Many agencies publish information on their web sites that will be reviewed by the committee. The agency will be contacted to determine if any statements of policy should be adopted as rules.

The committee will prepare a supplemental report in 2006 containing additional findings and recommendations.