

THE 1996 FLORIDA ADMINISTRATIVE PROCEDURE ACT'S ATTORNEY'S FEES REFORMS: CREATING INNOVATIVE SOLUTIONS OR NEW PROBLEMS?

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I. INTRODUCTION

In his 1995 inaugural address, Florida Governor Lawton Chiles proclaimed a war on red tape, urging legislators to streamline government rules and take power away from bureaucrats.¹ In 1996, the

* The author thanks Professor Jim Rossi, Florida State University College of Law, for his helpful comments and guidance throughout the development of this Comment.

1. See William Booth, *Florida Seeks End to Rule By the Book; For Some Regulators, Guidelines May Suffice*, WASH. POST, Mar. 14, 1995, at A1. The Governor was influenced by PHILLIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994), which comments on contradictory decisions made by government bureaucrats. See Booth, *supra*, at A1. However, even reviewers who praise Howard's book do not necessarily

Florida Legislature responded by amending the Administrative Procedure Act (APA).² Originally adopted in 1974,³ the APA establishes a framework that instructs state agencies how to promulgate and administer rules.⁴ Because the APA governs agency action ranging from environmental regulation to insurance rulemaking to overseeing professional conduct, its revision will have far reaching effects.

In reforming the APA, the Legislature used a powerful tool to tweak the administrative system: attorney's fees. The 1996 revisions authorize awards of attorney's fees in rule challenge proceedings and reorganize existing attorney's fees provisions.⁵ Attorney's fees provisions help redistribute resources from government to private parties, subtly altering litigation patterns.⁶ In the past, however, the effects of attorney's fees provisions have produced results different than expected.⁷ Thus, legislators should carefully craft attorney's fees provisions through narrowly tailored statutes designed to achieve their specific goals while minimizing companion costs.

The 1996 changes in Florida's attorney's fees provisions offer several substantial benefits to the administrative process, such as eliminating needless agency rules, simplifying the APA, monitoring agencies, and redistributing resources between public and private parties.⁸ However, the Legislature failed to minimize the damaging effects associated with the new changes, including overcrowded court dockets, increased litigation expenses, overdeterrence of agency actions, and higher financial costs for agencies and the regulated public.⁹ The 1996 attorney's fees provisions can be modified to minimize these effects while still accomplishing the goals of Governor Chiles and the Legislature. Other states can learn from Florida's use of attorney's fees as they attempt to shape private litigation patterns and agency action.

advocate his solution of a massive repeal of agency rules. See, e.g., Stephen T. Maher, *The Death of Rules: How Politics Is Suffocating Florida*, 8 ST. THOMAS L. REV. 313, 319 n.25 (1996) (citing George Gendron, *The Death of Common Sense, INC.*, May 1995, at 11 (book review)). Other reviewers are more critical of Howard's book, strongly disagreeing with his conclusion that government should rely upon general principles instead of legal rules. See *id.* at 319 n.27 (citing Robert F. Nagel, *The Death of Common Sense*, WASH. MONTHLY, Jan./Feb. 1995, at 45 (book review)). Critics assert that government cannot run on abstract principles with regulators relying only on their judgment. See *id.*

2. See Act effective Oct. 1, 1996, ch. 96-159, 1996 Fla. Laws 147 (codified at FLA. STAT. ch. 120 (Supp. 1996)).

3. See Administrative Procedure Act, ch. 74-310, 1974 Fla. Laws 952.

4. See FLA. STAT. § 120.54 (Supp. 1996).

5. See ch. 96-159, § 25, 1996 Fla. Laws at 194-96 (codified at FLA. STAT. § 120.595 (Supp. 1996)); see also discussion *infra* Part III.A.

6. See discussion *infra* Part V.A.4.

7. See Susan M. Olson, *How Much Access to Justice from State "Equal Access to Justice Acts"?*, 71 CHI.-KENT L. REV. 545, 577 (1996).

8. See discussion *infra* Part V.A.

9. See discussion *infra* Part V.B.

This Comment examines changes in the 1996 attorney's fees provisions from a cost/benefit perspective. Part II reviews recent legislative efforts to reform the APA and the major forces behind the 1996 revisions. Part III summarizes the available ways to collect attorney's fees in administrative proceedings after the 1996 changes. Part IV briefly describes the emergence of fee-shifting statutes in the United States and examines various types of fee-shifting mechanisms. Part V presents a detailed cost/benefit analysis of the 1996 attorney's fees provisions. Finally, Part VI proposes several changes to the new attorney's fees provisions. These changes are aimed at minimizing costs while still accomplishing the Legislature's goals.

II. SETTING THE STAGE: REVIEW OF RECENT APA REFORM EFFORTS

Like all administrative procedure acts, the Florida APA aims to prevent unlawful agency action and make agency decisionmaking "fair and open."¹⁰ However, Florida's system has been recently criticized for its lack of control over agencies¹¹ and its overly complex regulations.¹²

A. Stirrings for APA Reform

In 1994, in response to this criticism, both the Florida House of Representatives and the Florida Senate proposed bills containing major APA revisions.¹³ Although both bills died at the close of the 1994 Regular Session,¹⁴ legislators candidly agreed that APA reform was needed. The only dispute between the House and Senate was over how much reform was necessary.¹⁵

During his 1995 inaugural address, Governor Chiles announced plans to end government overregulation through APA reform.¹⁶ After his address, the Governor urged agency chiefs to seek out and repeal red-tape rules. Answering the Governor's call with particular enthusiasm, Florida Secretary of Transportation Ben G. Watts commented, "We compiled a list of rules and, lo and behold, out of 760

10. F. Scott Boyd, *A Traveler's Guide for the Road to Reform*, 22 FLA. ST. U. L. REV. 247, 248 (1994).

11. See *id.* at 270.

12. See Michael Peltier, *Long Agenda Awaits Legislators*, BUS. J.-JACKSONVILLE, Mar. 3, 1995, at 4-5.

13. See Fla. CS for HB 237 (1994); Fla. CS for SB 1440 (1994).

14. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1994 REGULAR SESSION, HISTORY OF HOUSE BILLS at 230, HB 237.

15. See Lawrence E. Sellers, Jr., *1994 Proposals for Rulemaking Reform*, 22 FLA. ST. U. L. REV. 327, 344 (1994). Sellers notes that observers should "watch for similar [reform] measures to be considered again in 1995." *Id.*

16. See Booth, *supra* note 1, at A1.

rules we found 330 to repeal.”¹⁷ Other agencies, such as the Department of Environmental Protection (DEP), also answered the Governor’s call to streamline regulation. Nevin Smith, DEP’s executive services director, commented that such a move would be positive because it would lead to “less mechanistic and legalistic” rules.¹⁸ Thus, a “bureaucracy-busting” attitude that affected legislators’ attitudes toward APA reform was prevalent before the 1995 Regular Session.¹⁹

Midway through the 1995 session, Governor Chiles called for a complete repeal of the APA, stating that the administrative process has become “too complicated for the average resident to participate [in] without hiring a lawyer.”²⁰ However, complete abolition of the APA was controversial because many legislators agreed that the APA provided citizens an avenue of relief from bureaucratic agency decisions.²¹

In 1995, the Legislature passed a major APA reform bill.²² However, the Governor vetoed the bill, claiming it did not simplify the administrative process enough.²³ After the veto, Governor Chiles ordered executive agencies to continue cutting unnecessary rules and established a commission to review the act and suggest reforms and simplifications.²⁴

17. *Id.*

18. *Id.* Smith used mangrove regulation to illustrate his point. See *id.* Mangroves are marine trees that serve as nurseries for wildlife. See *id.* Because of the disappearance of mangroves in Florida, DEP has provided regulations to prohibit trimming these trees. See *id.* In response to these regulations, no one trims mangroves, but they do not plant them either. Thus, Smith observes that this rule works against the ultimate goal of DEP: to have more mangroves to nurture Florida’s fish and other wildlife. See *id.* In a world without rules, DEP would allow mangrove pruning while encouraging planting. See *id.*

19. See Peltier, *supra* note 12, at 1.

20. Lucy Morgan, Campaign to Rein in Rules Is on Its Way, *ST. PETE. TIMES*, Mar. 29, 1995, at 5B. Opponents of a total repeal claimed that government without an administrative procedure act would be chaos. See *id.* Tallahassee lawyer Tom Pelham, former Secretary of the Florida Department of Community Affairs, commented that such a repeal “would be the worst kind of phantom government.” *Id.*

21. See Chiles Seeks to Repeal Act in Effort to Slice Red Tape, *ORLANDO SENT.*, Mar. 31, 1995, at C5.

22. See Fla. CS for CS for SB 536 (1995).

23. Veto of Fla. CS for CS for SB 536 (1995) (letter from Gov. Chiles to Sec’y of State Sandra B. Mortham, July 12, 1995) (on file with Sec’y of State, The Capitol, Tallahassee, Fla.); see also Chiles Vetoes Measure to Reduce Regulations, Citing Many Problems, *FT. LAUD. SUN SENT.*, July 13, 1996, at 12A. The Governor claimed that “he liked some aspects of the package but they were outweighed by a list of problems he perceived.” *Id.* The veto decision was not unexpected. In fact, Senate leaders delayed the bill’s arrival on Chiles’ desk, hoping that time might change the Governor’s mind. See *id.* Environmentalists applauded Governor Chiles’ veto. David Gluckman, an environmental lobbyist, commented that the 1995 measure was not a bill to “streamline administrative procedures, it was a bill to shut down government.” Craig Quintana, Chiles Scuttles Regulatory-Reform Bill, *ORLANDO SENT.*, July 13, 1995, at C1.

24. See Quintana, *supra* note 23, at C1.

B. The Governor's Review Commission

The Governor established a fifteen-member Governor's Administrative Procedure Act Review Commission (Review Commission) to make suggestions for reforming and simplifying the APA.²⁵ The Review Commission played a major role in formulating the legislative proposal that ultimately passed the Legislature and won the Governor's signature in 1996.

The Review Commission focused on three basic areas of reform: (1) simplifying the APA; (2) increasing flexibility in the application of administrative rules; and (3) increasing agency accountability to the Legislature and the public.²⁶ To give the administrative process flexibility and to dispel perceptions of the system's rigidity, the Review Commission recommended a new variance and waiver provision.²⁷ The Review Commission also proposed rules to force agencies to become more accountable to the Legislature and the general public.²⁸ For example, the Review Commission recommended that staff analyses of bills highlight sections of proposed legislation that would require agency rulemaking.²⁹ Agency input would be invited and included in the staff analyses.³⁰

One of the major themes that the Review Commission sounded was creating a "more level playing field" for persons who challenge agency rules.³¹ To facilitate this goal, the Review Commission proposed abolishing the presumption of validity that attached to proposed agency rules.³² The Review Commission thought a presumption of validity should attach to a rule only after an agency proposal met the APA's procedural requirements.³³

In addition, the Review Commission proposed changing the provisions for attorney's fees.³⁴ The Review Commission supported an award of attorney's fees and costs whenever an agency rule is overturned.³⁵ However, the Review Commission recommended allowing

25. See generally GOV.'S ADMIN. PROC. ACT REV. COMM'N, FINAL REPORT (1996) [hereinafter REVIEW COMMISSION REPORT]. The Review Commission met six times between October 1995 and February 1996 to review the current administrative regulations and make formal recommendations. See *id.* at v; see also Adam Yeomans, State Cutting Rules; Chiles Seeks Even Less Red Tape, FT. LAUD. SUN SENT., Jan. 29, 1996, at 5A.

26. See REVIEW COMMISSION REPORT, *supra* note 25, at 1.

27. See *id.*

28. See *id.* at 2.

29. See *id.*

30. See *id.* Although agencies have sometimes provided informal comments or suggestions regarding proposed legislation to committee staff members in the past, this proposal would give agencies formal input into bill analyses.

31. *Id.*

32. See *id.*

33. See *id.* at 2-3.

34. See *id.* at 3.

35. See *id.*

the agency to avoid paying the prevailing party's attorney's fees if the agency proves that its actions were "substantially justified."³⁶ The Review Commission decided that recovery of attorney's fees should be limited to \$15,000 per action.³⁷

C. The Reforming APA Legislation

At the beginning of the 1996 session, Senators Charles Williams³⁸ and Rick Dantzler³⁹ introduced Senate Bill 2290 to amend chapter 120, Florida Statutes.⁴⁰ The bill was combined with Senate Bill 2288, passed the Legislature, and was signed into law by Governor Chiles on May 1, 1996.⁴¹ The legislation addresses various issues, including legislative oversight, rulemaking authority, new procedural requirements in rulemaking, and, of course, attorney's fees.⁴²

III. THE AVAILABLE AVENUES FOR OBTAINING ATTORNEY'S FEES AFTER THE 1996 REGULAR SESSION

Chapter 96-159, Florida Laws, makes several significant changes in the available ways to procure attorney's fees and court costs. Most significantly, the new law makes attorney's fees and costs available in rule challenge proceedings.⁴³ The legislation retains all previously enacted chapter 120 attorney's fees provisions that were aimed at deterring litigation initiated for improper purposes.⁴⁴ The law contributes to overall APA simplification by combining in section 120.595, Florida Statutes, the once-scattered attorney's fees provisions. Additionally, the Legislature kept attorney's fees provisions in the Florida Equal Access to Justice Act (FEAJA),⁴⁵ allowing small businesses to retain an additional avenue for recouping APA litigation costs.

A. Overview of General Attorney's Fees Provisions in the New APA

The most significant change in the APA attorney's fees scheme is the addition of attorney's fees provisions for rule challenge proceed-

36. *Id.* The standard of "substantially justified" would be as defined in the Equal Access to Justice Act. See FLA. STAT. § 57.111 (1995).

37. See REVIEW COMMISSION REPORT, *supra* note 25, at 3.

38. Dem., Live Oak.

39. Dem., Winter Haven.

40. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1996 REGULAR SESSION, HISTORY OF SENATE BILLS at 174, SB 2290.

41. See Act effective Oct. 1, 1996, ch. 96-159, 1996 Fla. Laws 147.

42. See generally *id.*

43. See FLA. STAT. § 120.595(2)-(3) (Supp. 1996).

44. See *id.* § 120.595(1), (4), (5).

45. See *id.* § 57.111 (1995).

ings.⁴⁶ The revised APA makes attorney's fees and costs available to challengers of both proposed and existing rules.⁴⁷ Rule challengers may collect attorney's fees from an agency if a rule is found to be invalid, unless the agency demonstrates that its actions were substantially justified or other special circumstances exist that make the award unjust.⁴⁸ All awards of attorney's fees are limited to \$15,000 per rule challenge proceeding.⁴⁹

The new law retains the provision in former section 120.57(1)(b)(5), Florida Statutes, that awarded attorney's fees when an action was commenced by any party for an improper purpose.⁵⁰ The law also retains the provision in former section 120.59, Florida Statutes, that provided factors for administrative law judges to consider when determining whether an action was commenced for an improper purpose.⁵¹ Additionally, the revised APA provides for reasonable attorney's fees and costs for both appellate and administrative proceedings if the agency improperly ignored or modified findings of fact within a recommended order.⁵² Attorney's fees also are awarded if a court determines that an "appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion."⁵³

Secondarily, the bill consolidates all attorney's fees provisions in a new location, section 120.595, Florida Statutes.⁵⁴ Thus, the bill provides for a more readable and understandable APA.⁵⁵

46. This Comment refers to these new attorney's fees provisions as the "rule challenge attorney's fees provisions." This should be distinguished from "1996 attorney's fees changes," which refer to all of the attorney's fees changes made in 1996.

47. See FLA. STAT. § 120.595(2), (3) (Supp. 1996).

48. See *id.* "Substantially justified" is defined as having a "reasonable basis in law and fact at the time the actions were taken by the agency." *Id.*

49. See *id.*

50. See *id.* § 120.595(1)(e)(1). This section defines "improper purpose" as initiating litigation to "harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity." *Id.*

51. See *id.* § 120.595(1)(c). The administrative law judge is to consider whether the nonprevailing party has participated in two or more other such proceedings arising from the same transaction with the same adverse party. See *id.* The administrative law judge must further decide whether the nonprevailing party established either the factual or legal merits of its position earlier and whether the position taken at the present proceeding was cognizable in one of the previous proceedings. See *id.*

52. See *id.* § 120.595(5).

53. *Id.*

54. Other attorney's fees provisions potentially applicable to agencies are codified in places other than section 120.595. However, these provisions are tailored to specific situations, limiting their availability to the average litigant. See, e.g., FLA. STAT. § 448.08 (1995) (awarding attorney's fees and costs to prevailing party in a suit for unpaid wages).

55. The consolidation of attorney's fees provisions exemplifies fulfillment of the Review Commission's goal to create a more readable APA without making substantive changes. See REVIEW COMMISSION REPORT, *supra* note 25, at 6.

B. The Effect of the FEAJA on the New Mix of Available Administrative Attorney's Fees

In 1980, the Congress passed the Equal Access to Justice Act (EAJA), which requires the United States and its agencies to pay private parties' attorney's fees and litigation costs in certain circumstances.⁵⁶ Twenty-nine states quickly followed suit, enacting state EAJAs in the following decade.⁵⁷ Florida passed the Florida Equal Access to Justice Act (FEAJA) in 1984.⁵⁸ The FEAJA offers an additional avenue for parties to obtain attorney's fees and costs in administrative proceedings against state agencies. When it enacted the FEAJA, the Legislature intended to help private parties defending against state action. The Legislature recognized that

because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant. The purpose of [the FEAJA] is to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state.⁵⁹

Although not a part of the APA, the FEAJA has broad effects upon administrative litigation and provides an alternative route for some parties to obtain litigation costs and attorney's fees. Thus, the FEAJA is an important component of Florida's available attorney's fees statutes.

Like the EAJA, the FEAJA contains a provision that establishes an award of attorney's fees and costs to small business parties that prevail "in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency."⁶⁰ The private litigant has the initial burden of proving by a preponderance of evidence that he or she qualifies as a small business party⁶¹ and pre-

56. See Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, §§ 201-208, 94 Stat. 2321, 2325-30 (1980) (codified as amended at 28 U.S.C. § 2412 (1994)).

57. See Olson, *supra* note 7, at 552.

58. See Florida Equal Access to Justice Act, ch. 84-78, 1984 Fla. Laws 200 (codified as amended at FLA. STAT. § 57.111 (1995)). The Florida Legislature modeled the FEAJA after the EAJA. See Department of Prof'l Reg. v. Toledo Realty, Inc., 549 So. 2d 715, 717 (Fla. 1st DCA 1989).

59. FLA. STAT. § 57.111(2) (1995).

60. *Id.* § 57.111(4) (1995). For an additional discussion of the FEAJA, see Steven Wisotsky, *Practice and Procedure Under the FEAJA*, FLA. B.J., Apr. 1996, at 24.

61. See FLA. STAT. § 57.111(3)(d) (1995). The statute defines a "small business party" as a sole proprietor of an unincorporated business, including a professional practice, whose principle place of business is in Florida. See *id.* § 57.111(3)(d)(1)(a). The definition also includes a partnership or corporation whose principle place of business is in Florida. See *id.* § 57.111(3)(d)(1)(b). In both cases, the entity must not have had more than 25 full-time employees or a net worth exceeding \$2 million. See *id.* § 57.111(3)(d)(1)(a)-(b).

vailed in the previous proceeding.⁶² If this burden is satisfied, then the agency must prove that there were special circumstances warranting agency action or that the action was substantially justified.⁶³ To take advantage of the FEAJA, an attorney must file an application on behalf of his or her client within sixty days after prevailing in the proceeding.⁶⁴ The agency must respond to the application within twenty days, stating why the attorney's fees and costs sought by the prevailing party are unreasonable or explaining why the agency's actions were substantially justified.⁶⁵ The FEAJA limits the award of both litigation fees and costs to \$15,000 per action.⁶⁶

C. Comparison of the FEAJA and Rule Challenge Attorney's Fees Provisions

The 1996 Legislature left the FEAJA virtually unchanged.⁶⁷ Under the FEAJA, prevailing small businesses have an avenue for the award of attorney's fees and court costs in proceedings initiated by the state. In contrast, the revised APA makes attorney's fees available in a rule challenge proceeding to any nonagency party if an administrative law judge declares an existing or proposed rule invalid.⁶⁸ Thus, the rule challenge attorney's fees provisions have a broader scope of eligibility than the FEAJA.

The FEAJA and the rule challenge provisions also have different fee caps. The FEAJA limits both attorney's fees and litigation costs to \$15,000 per action.⁶⁹ This limitation has been criticized as inadequate to compensate a litigant for court costs and attorney's fees.⁷⁰ The limitation also allows agencies a "free appeal" where the business party has reached the \$15,000 ceiling for costs and attorney's

62. See *id.* § 57.111(3)(c). A party is the "prevailing small business party" when (1) a final judgment has been entered in favor of the party; (2) a settlement has been obtained by the party on the majority of the suit's issues; or (3) the state agency has sought voluntary dismissal of its complaint. See *id.*

63. See *id.* § 57.111(4)(a).

64. See *id.* § 57.111(4)(b)(2). The application must assert that the party met the requisite burdens of being a small business party and prevailed in the proceeding. See FLA. ADMIN. CODE R. 60Q-2.035(3)(1995). The application also must include "the nature [and] extent" of the attorney's legal services and include other litigation costs involved in the action. *Id.*

65. See FLA. ADMIN. CODE R. 60Q-2.035(5)(a)(1), (3) (1995).

66. See FLA. STAT. § 57.111 (4)(d)(2) (1995).

67. See Act effective Oct. 1, 1996, ch. 96-410, § 6, 1996 Fla. Laws 2941, 2943-44 (codified at FLA. STAT. § 57.111(4)(b)(d)). The Legislature made only superficial changes to the FEAJA, changing the term "hearing officer" to the term "administrative law judge." See *id.*

68. See FLA. STAT. § 120.595(2), (3) (Supp. 1996).

69. See *id.* § 57.111(4)(d)(2) (1995).

70. See Wisotsky, *supra* note 60, at 32.

fees.⁷¹ The rule challenge provisions have a \$15,000 cap on attorney's fees exclusive of litigation costs.⁷² Thus, the rule challenge provisions have a much higher total attorney's fees award potential than the FEAJA.

IV. OVERVIEW OF FEE-SHIFTING MECHANISMS AND THEIR EMERGENCE IN AMERICAN JURISPRUDENCE

Federal courts have traditionally adhered to the "American Rule," which dictates that parties pay their own attorney's fees and litigation costs, regardless of who wins the litigation.⁷³ However, lawmakers have begun to create exceptions to the general rule. Recognizing the powerful potential effects of reallocating attorney's fees, lawmakers have used fee-shifting provisions to effectuate specific goals in special litigation situations.⁷⁴ For example, the 1996 attorney's fees changes were created to carry out the goals outlined by Governor Chiles and the Review Commission.⁷⁵

Two major types of exceptions to the American Rule exist: two-way fee-shifting mechanisms and one-way fee-shifting mechanisms.⁷⁶ Two-way fee-shifting mechanisms, used by the British, require the loser to pay the prevailing party's litigation costs and thus treat most defendants and plaintiffs equally.⁷⁷ More common in the United States is the one-way fee-shifting mechanism. The one-way fee shift, which is generally pro-plaintiff, allows a prevailing plaintiff to collect attorney's fees from the defendant, but does not allow a prevailing defendant to collect from the plaintiff.⁷⁸ Variations of these basic types of fee-shifting mechanisms also exist. For example, a two-way shift may require defendants to meet a higher standard of proof to recover than is required of plaintiffs.⁷⁹

The choice of a fee-shifting mechanism depends largely upon the intended effects of the fee shift because one-way and two-way mechanisms have quite different impacts upon litigation.⁸⁰ Legisla-

71. See *Agency for Health Care Admin. v. Redi-Care Home Serv., Inc.*, 650 So. 2d 222, 222 (Fla. 1st DCA 1995) (denying fees on appeal because agency had previously paid out the maximum amount under the \$15,000 cap).

72. See FLA. STAT. § 120.595(2), (3) (Supp. 1996).

73. See Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C. L. REV. 613, 613 (1983). Courts have followed the American Rule since the U.S. Supreme Court held in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796), that attorney's fees are not recoverable by a prevailing party as damages and that each party must bear the burden of its own attorney's fees. See *id.* at 306; see also Mallor, *supra*, at 653 n.1.

74. See Mallor, *supra* note 73, at 613-614.

75. See discussion *supra* Part II.B.

76. See Olson, *supra* note 7, at 548.

77. See *id.*

78. See *id.*

79. See *id.*

80. See *id.*

tors may consider a two-way fee shift to provide indemnification to the winner of litigation.⁸¹ Legislators may invoke a one-way shift to create a stronger manipulative effect upon an area of litigation, perhaps using the fee shift as an economic incentive.⁸² In addition, legislators should contemplate the impact of the fee-shifting mechanism upon procedural practices and judicial staffing for the specific area of substantive law affected by the fee shift.⁸³

V. A COST/BENEFIT ANALYSIS OF THE 1996 ATTORNEY'S FEES CHANGES

The rule challenge attorney's fees provisions are one-way fee-shifting mechanism because they award attorney's fees only to prevailing challengers of agency rules and not to prevailing agencies.⁸⁴ The FEAJA also is a one-way fee-shifting mechanism because it applies exclusively to small businesses and cannot be utilized by the opposing agency.⁸⁵ To predict the costs and benefits of the rule challenge attorney's fees provisions, this Comment will analyze the effects common to one-way fee-shifting mechanisms, primarily the FEAJA, which was enacted for many of the same reasons as the rule challenge provisions.⁸⁶

A. Potential Benefits of the 1996 Attorney's Fees Changes

Governor Chiles, the Review Commission, and the 1996 Legislature contemplated specific goals when they called for APA reform. These goals included less red tape, a more simplified APA, greater citizen participation, increased agency monitoring, and equalization of resources between public and private parties.⁸⁷ The Review Commission and the 1996 Legislature crafted the attorney's fees changes with these goals in mind. Thus, this analysis begins by considering whether the 1996 changes will accomplish these goals.

81. See *id.*

82. See Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 *DUKE L.J.* 651, 653.

83. See *id.* at 655.

84. See *FLA. STAT.* § 120.595(2), (3) (Supp. 1996).

85. See *id.* § 57.111 (1995).

86. The FEAJA was enacted because "certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and administrative proceedings." *Id.* § 57.111(2). Similarly, the rule challenge attorney's fees provisions were enacted, in part, to create a "more level playing field" for persons who challenge agency rules. See *REVIEW COMMISSION REPORT*, *supra* note 25, at 2.

87. See discussion *supra* Part II.B.

1. Cutting Red Tape

Awarding attorney's fees for successful rule challenges is likely to have an anti-rulemaking effect because it creates an incentive to challenge agency rules.⁸⁸ Individuals gain an incentive to litigate when they can obtain enough relief to compensate them for their efforts and their risk.⁸⁹ The rule challenge attorney's fees provisions will encourage parties to challenge agency rules because additional attorney's fees and costs will enhance damage awards, making litigation more attractive.⁹⁰ Because parties can now obtain reimbursement for their litigation costs, the rule challenge attorney's fees provisions will induce suits where minimal, if any, monetary damages were previously recoverable.⁹¹ Additionally, agencies may be more cautious in their rulemaking efforts, which will result in fewer agency rule proposals and, consequently, fewer agency rules.⁹² The rule challenge attorney's fees provisions will thus be effective in contributing to cutting red tape, thereby satisfying at least one of the goals envisioned by the Governor.

2. Simplifying the APA

The 1996 attorney's fees changes relocated virtually all general attorney's fees provisions to one section in the APA.⁹³ Combining attorney's fees provisions and placing them in section 120.595, Florida Statutes, makes the APA more logical and organized and thus easier to understand.⁹⁴ However, the 1996 Legislature could have made the simplification process more complete by also including the FEAJA in section 120.595. Unlike all of the other general attorney's fees provisions that affect administrative proceedings, the FEAJA is not contained in section 120.595, but rather in section 57.111, Florida Statutes. An absolute simplification of attorney's fees provisions in the APA must include the FEAJA in section 120.595 because the

88. See Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2048 (1993).

89. See *id.*

90. See *id.*

91. Previously, parties would not have had enough incentive to litigate when the recovery award would not even cover their attorney's fees. Now, parties with few resources will be much more likely to sue when they foresee a good opportunity to litigate successfully, especially where a contingency fee arrangement had not previously been an option. Therefore, more lawyers will be willing to accept cases challenging agency rules and more litigants will be seeking counsel. See *id.*

92. See discussion *infra* Part V.B.4.

93. See FLA. STAT. § 120.595 (Supp. 1996); see also discussion *supra* Part III.A.

94. But see Maher, *supra* note 1, at 342 (contending that the new version of the APA will create confusion and unnecessary costs because people will not be able to find the "familiar things").

FEAJA concerns attorney's fees and pertains exclusively to the APA.⁹⁵

3. Monitoring Agency Action

One-way fee-shifting provisions are frequently enacted for monitoring purposes.⁹⁶ The rule challenge attorney's fees provisions offer two ways to increase monitoring of state agencies. First, the increased litigation sparked by the availability of additional attorney's fees might bring more potentially wrongful agency actions to the attention of oversight committees.⁹⁷ By encouraging litigation,⁹⁸ the rule challenge attorney's fees provisions will provide a consistent flow of information about the pitfalls of agency rulemaking.⁹⁹ Legislators and agency officials can take note of the most frequently litigated provisions that courts struggle to interpret or apply. With this knowledge, they can better judge which agency enabling statutes require reform. Thus, the rule challenge attorney's fees provisions will potentially further agency oversight by highlighting those statutes that demand reform.¹⁰⁰

Second, the increased litigation resulting from the rule challenge attorney's fees provisions will give judges the opportunity to examine the validity of a greater number of agency rules. Heightened judicial review of agency rules will ensure that agencies act consistently with their delegated authority.¹⁰¹ Aware of this enhanced oversight, agencies will be less likely to exceed their delegated authority when formulating rules and will be encouraged to create rules that are practical and intelligible.¹⁰² Accordingly, the rule challenge attorney's fees provisions likely will satisfy the Review Commission's goal of increased agency monitoring, thereby benefiting the entire administrative process.

95. See FLA. STAT. § 57.111 (1995).

96. See Krent, *supra* note 88, at 2046. Congress has relied upon judges and affected parties to aid in federal agency monitoring. For example, Congress created private rights of action under the Federal Labor Relations Authority, see 5 U.S.C. §§ 7101-7135 (1994), and the Merit Systems Protection Board, see 5 U.S.C. §§ 7701-7703 (1994). Similarly, one-way fee shifting mechanisms employ the help of judges and private parties to police agency actions. See Krent, *supra* note 88, at 2047-48.

97. See Krent, *supra* note 88, at 2047.

98. The 1996 attorney's fees changes encourage more litigation in rule challenge proceedings by providing a higher fee award. For a more complete discussion of the litigation incentive of attorney's fees, see *infra* Part V.B.2.

99. See Krent, *supra* note 88, at 2047.

100. See *id.*

101. See REVIEW COMMISSION REPORT, *supra* note 25, app. O, at 1 (stating that increased monitoring will occur if attorney's fees and costs are levied against state agencies); see also Krent, *supra* note 88, at 2047.

102. See Krent, *supra* note 88, at 2048.

4. Creating a More Level Playing Field

The 1996 Legislature strove to create a more level playing field for the public by adding the rule challenge attorney's fees provisions. Similarly, one-way fee-shifting mechanisms, such as the FEAJA and the EAJA, have often been enacted to eliminate the imbalance of resources between the private sector and state agencies.¹⁰³ One-way fee-shifting statutes, however, have had unpredictable redistributive effects.¹⁰⁴ The specific features of a fee-shifting statute greatly influence its effectiveness in redistributing resources.¹⁰⁵

The design of the rule challenge attorney's fees provisions is relatively simple: a determination that an existing or proposed agency rule is invalid results in a judgment or order for attorney's fees and costs unless the agency can prove its actions were substantially justified.¹⁰⁶ Though simple, the rule challenge attorney's fees provisions likely will have a powerful redistributive effect because the successful challengers of agency rules automatically receive attorney's fees and costs without having to jump through additional hoops.¹⁰⁷

The agency has the burden of proving that its actions were substantially justified.¹⁰⁸ The substantial justification standard of recovery has helped prevent private parties from successfully recovering under one-way fee-shifting statutes, thereby limiting the redistributive effects of the statute.¹⁰⁹ Because the rule challenge attorney's fees provisions place this burden on agencies, the effects that the substantial justification standard will have on the success rate of private parties under section 120.595 will be minimized.¹¹⁰ Additional dilution of the standard's effects will occur because Florida courts have been generous in awarding attorney's fees under the

103. See discussion *supra* Part III.B; see also Olson, *supra* note 7, at 548; Rowe, *supra* note 82, at 664. For example, Congress created a one-way fee shifting mechanism for damages under wage statutes that involve employees suing their financially advantaged employers. See, e.g., 29 U.S.C. § 216 (1994).

104. See Olson, *supra* note 7, at 577.

105. See *id.*

106. See FLA. STAT. § 120.595(2), (3) (Supp. 1996).

107. Under the rule challenge attorney's fees provisions, a judgment for costs and attorney's fees is rendered against the nonprevailing party after a rule or proposed rule is declared invalid. See *id.* Under the FEAJA, a prevailing small business party must file an application within 60 days of the final judgment to receive an award of attorney's fees. See *id.* § 57.111(4)(b)(2) (1995).

108. See *id.* § 120.595(2), (3) (Supp. 1996).

109. See Olson, *supra* note 7, at 578. The substantial justification standard represents a compromise between the anti-government and anti-litigation movements. See *id.* at 578-79. For further discussion of these competing ideologies, see discussion *infra* Part V.B.2.

110. See Olson, *supra* note 7, at 563 ("[T]he difficulty of meeting this standard is reduced somewhat by putting the burden of proof on the government to show that its conduct was substantially justified . . .").

FEAJA,¹¹¹ which also contains a substantial justification standard.¹¹² Accordingly, the inclusion of a substantial justification standard in section 120.595 will have a minimal impact upon the redistributive effects of the statute. Secondly, the \$15,000 cap on attorney's fees also may limit the redistributive effects of the rule challenge attorney's fees provisions, but to a much lesser extent than the substantial justification standard.¹¹³

Regardless of the \$15,000 cap and the substantial justification standard, the rule challenge attorney's fees provisions will help level the playing field between the public and state agencies. Now, private parties can challenge dysfunctional agency rules when previously such a challenge would not have been financially advantageous.¹¹⁴

5. Citizen Participation

One of the original purposes of the APA was to give citizens a voice in the rulemaking process.¹¹⁵ Additionally, public participation in rulemaking contributes to the legitimacy of agency rules and enhances their authority.¹¹⁶

The rule challenge attorney's fees provisions will increase citizen participation in agency rulemaking by providing private parties with a monetary incentive to challenge proposed agency rules. Thus, the number of citizens involved in the rulemaking process will increase, which will improve the quality of agency proposals and enhance the rule development process.¹¹⁷

B. Potential Costs of the 1996 Attorney's Fees Changes

Generally, the 1996 attorney's fees changes will accomplish the goals they were created to achieve. However, the benefits associated

111. See *id.* at 575. Floridians litigating under the FEAJA are successfully awarded attorney's fees and costs more than 50% of the time. See *id.* This percentage implies that Florida courts have chosen to make it fairly difficult for agencies to prove that their acts were substantially justified. See *id.*

112. See FLA. STAT. § 57.111(4)(a) (1995).

113. See Olson, *supra* note 7, at 562. The \$15,000 cap only limits the redistributive effects of litigation that rule challengers perceive to cost considerably more than \$15,000. In those situations, plaintiffs may choose not to challenge the rule when they risk a large sum of their own money in attorney's fees and costs. See *id.*

114. See Mallor, *supra* note 73, at 613.

115. See Johnny C. Burris, *The Failure of the Florida Judicial Review Process to Provide Effective Incentives for Agency Rulemaking*, 18 FLA. ST. U. L. REV. 661, 690 (1990) ("One of the purposes of the APA was to open up the relatively hidden and inaccessible decision processes of administrative agencies to more public participation.").

116. See CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 162 (1994). Agencies depend upon the public to supply a constant flow of information about potential rules. See *id.* Such information allows the agency to consider the acceptance of and resistance to specific rule development efforts. See *id.* The members of the public will be more accepting of a rule that they had a role in creating. See *id.*

117. See *id.*

with the changes should be weighed against their potential costs. These potential costs include greater financial burdens, overcrowded court dockets, overdeterrence of agency action, and increased litigation costs.

1. Financial Costs

The rule challenge attorney's fees provisions will have a negative impact upon agency budgets because of awards of attorney's fees and litigation costs. Consequently, agencies might be forced to pass the increased costs on to the public by raising agency and license fees.¹¹⁸ Thus, the public will eventually shoulder the costs inherent in giving the less well-off the means to challenge agency rules.¹¹⁹ Other state legislatures considering whether to implement attorney's fees provisions also must consider whether the financial costs borne by the public will be offset by the resulting benefits.

The \$15,000 cap on rule challenge attorney's fees will help limit the costs that agencies pay to litigants. However, unlike the FEAJA, litigation costs are not included in the cap, allowing agencies' costs to increase exponentially.¹²⁰ The cap on attorney's fees provoked varying opinions from members of the Review Commission. While Commissioner Wade Hopping felt that the \$15,000 figure was too low, Commissioner Linda Shelley noted that the Legislature does not appropriate money for agencies to spend on attorney's fees and that \$15,000 in such circumstances amounts to a lot of money.¹²¹ A review of other states' one-way fee-shifting statutes reveals that most impose a per-hour cap, generally \$75 per hour for attorney services.¹²² The FEAJA's \$15,000 cap is one of the highest of any state that uses a total amount cap.¹²³ Thus, the \$15,000 fee cap on rule challenge attorney's fees allows a potentially large fee award to be assessed against state agencies, imposing a sizable financial burden that will eventually be passed on to the regulated public.

Critics claim that the old APA did not have sufficient organizational problems to warrant simplification.¹²⁴ They maintain that there have been no organizational problems cited by courts or com-

118. See Fla. S. Comm. on Gov't Reform & Oversight, CS for SBs 2290 & 2288 (1996) Staff Analysis 29 (final Mar. 21, 1996) (on file with comm.).

119. See *id.*

120. See FLA. STAT. § 120.595(2), (3) (Supp. 1996).

121. See REVIEW COMMISSION REPORT, *supra* note 25, app. D, at 3 (minutes of Jan. 11, 1996 meeting).

122. See Olson, *supra* note 7, at 562.

123. See *id.* at 562 n.85. Most other states using a total cap amount have limits of \$7,500 (10 states) or \$10,000 (six states). Only Florida and Minnesota have higher total fee caps. See *id.*

124. See Maher, *supra* note 1, at 342.

mentators in recent history.¹²⁵ Instead, the APA's cosmetic changes may force the state to incur substantial costs stemming from lost productivity because state workers will need to be retrained.¹²⁶ Thus, the potential uncertainty and confusion that may result in part from reorganization of attorney's fees provisions also carries financial costs.¹²⁷

2. Overcrowded Court Dockets

Legislation often reflects both an anti-government ideology supporting deregulation of the marketplace and a feeling that society is burdened by too much litigation.¹²⁸ Many Americans harbor both attitudes as well, but the two can easily conflict. The rule challenge attorney's fees provisions respond to Governor Chiles' deregulation sentiments by employing the courts to weed out dysfunctional agency rules. However, using the courts to streamline agency regulation will increase litigation and place higher demands upon the judicial system.

Although litigation has increased across the country in recent years,¹²⁹ courts remain prisoners to the time constraints of judges. The influx of cases challenging agency rules will further crowd the already burgeoning dockets of Florida courts and slow the overall pace of litigation in the state.¹³⁰

3. Higher Litigation Costs

One-way fee-shifting statutes increase the number of issues that parties must litigate and therefore increase attorney's fees and court costs.¹³¹ The simplicity of the 1996 attorney's fees changes will mitigate this effect, but increased litigation costs are inevitable. The rule challenge attorney's fees provisions will automatically increase the litigation expenses of an agency when a rule is challenged in court. The agency must expend its legal resources to prove that its rule-making was substantially justified.¹³² However, even though the

125. See *id.* at 343.

126. See *id.* at 342.

127. See *id.* at 344-45.

128. See Olson, *supra* note 7, at 545-46, 549.

129. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1093 (1987).

130. Cf. Maher, *supra* note 1, at 346 (predicting that simplification of the APA will reduce the number of lawyers willing to sift through the reorganized and unfamiliar APA).

131. See Krent, *supra* note 88, at 2082-83; see generally, e.g., *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (devoting the majority of the opinion to discussing attorney's fees issues).

132. See Krent, *supra* note 88, at 2083; Risa L. Lieberwitz, *Attorney's Fees, The NLRB, and the Equal Access to Justice Act: From Bad to Worse*, 2 HOFSTRA LAB. L.J. 1, 40 (1984). Professor Krent emphasizes that complex attorney's fees litigation is largely due to the substantial justification standard. See Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act—A Qualified Success*, 11 YALE L. & POL'Y REV. 458, 479 (1993).

substantial justification standard adds to agency litigation costs, the standard presumably deters future parties from seeking attorney's fees where the parties concede that the agency action was justified. Accordingly, the substantial justification standard also may save agencies money by deterring fee claims.¹³³ However, the substantial justification standard will impose higher costs upon Florida courts because of the time spent hearing attorney's fees issues.¹³⁴

Furthermore, one-way fee-shifting statutes increase litigation costs by decreasing settlement incentives. Logically, the more issues that parties must dispute, the lesser the probability of agreement.¹³⁵ Liability for attorney's fees and litigation costs give parties new issues to resolve, thus decreasing the chances for settlement. Although simple in design, the rule challenge attorney's fees provisions will still make settlement less likely, thereby increasing litigation expenses.¹³⁶ These increased expenses will eventually flow to the public, the ultimate financier of the judicial system and agency operations.¹³⁷

4. Overdeterrence of Agency Regulation—Cutting Too Much Red Tape?

Although the 1996 attorney's fees changes were created in part to reduce red tape by deterring promulgation of invalid agency rules,¹³⁸ overdeterrence is a potential risk.¹³⁹ While to some extent the substantial justification standard guards against overdeterrence, it is still a viable risk because of the overall design of the rule challenge attorney's fees provisions.

a. Problems with Attorney's Fees for Proposed Rules

Section 120.595, Florida Statutes, allows a judgment to be rendered against an agency for attorney's fees if a proposed or existing rule is declared invalid.¹⁴⁰ A proposed rule is an agency's first official step in rulemaking, signaling the beginning of the rule development

133. See Krent, *supra* note 132, at 479-82. The litigation costs to agencies of proving substantial justification issues probably exceeds the amount saved in attorney's fees in minor litigation because the standard requires parties to relitigate their underlying dispute. See *id.* Large amounts of agency resources are required for attorney's fees litigation. See *id.* Nevertheless, the gate-keeping function served by the substantial justification standard saves valuable agency resources by deterring attorney's fees claims. See *id.*

134. See Krent, *supra* note 88, at 2082-83.

135. See *id.* at 2079-80.

136. See *id.*

137. See *id.* at 2083.

138. See discussion *supra* Part II.B.

139. See Krent, *supra* note 88, at 2075.

140. See FLA. STAT. § 120.595(2), (3) (Supp. 1996).

process.¹⁴¹ After an agency publishes a notice of rule development, the APA provides many opportunities for public input on the proposal through hearings and workshops.¹⁴² Each invitation for public commentary contributes to the lengthy and arduous rule development process.¹⁴³

Because of the tentative nature of proposed rules, the imposition of attorney's fees when proposed rules are invalidated could have a drastic impact upon agency rulemaking.¹⁴⁴ Agencies will likely reduce the number of rules they propose for fear of the high litigation costs that accompany successful rule challenges. Agencies will find themselves in a defensive stance, always making sure that they have undeniable and substantial justifications for placing their proposals into the rule development process.¹⁴⁵ Putting agencies in such a precarious position will hinder the rule development process by making agencies hesitant to put proposals on the public negotiating table.

b. The Necessity of Utilizing Attorney's Fees to Deter Agency Rulemaking

A primary reason for assessing attorney's fees when proposed rules are found invalid stems from Governor Chiles' call to cut red tape. However, the APA already facilitates this goal by giving affected parties input in the rulemaking process.¹⁴⁶ Critical commen-

141. See *id.* § 120.54(2)(a). When an agency proposes a rule, it must publish a notice of rule development in the Florida Administrative Weekly. See *id.*

142. See *id.* § 120.54(2)(c). The agency must hold a public workshop if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary. See *id.* Before adopting the rule, the agency must publish its intent. See *id.* § 120.54(3)(a)(1). After deciding to adopt the rule, an agency must provide even more opportunities for challenging the rule, such as scheduling a public hearing upon the request of any affected person. See *id.* § 120.54(3)(e)(1). An agency can also voluntarily hold a public hearing. See *id.*

143. The rulemaking process can be lengthy because of the potential for numerous public hearings. In addition, an agency cannot modify anything other than technical defects in the proposed rule unless the modifications are supported by the public hearing record or are in response to either a written comment received before the public hearing or a proposed objection by the Legislature's Joint Administrative Procedures Committee. See *id.* § 120.54(3)(d)(1).

144. Cf. Krent, *supra* note 88, at 2078. Professor Krent finds a small risk in overdetering agency action where a substantial justification standard exists. Although the rule challenge attorney's fees provisions contain a substantial justification standard, the underlying conduct of agencies will be affected because the revised APA assesses litigation costs at the proposal level. See *id.*

145. See *id.* Agencies will be careful to stay within a safe zone. In the initial stages of rulemaking, this cautiousness may dangerously minimize an agency's willingness to introduce proposals. See *id.*

146. By allowing affected parties a voice in the rule development process, the APA invites the most critical parties' opinions. Such a thorough examination exposes a proposal's most prominent flaws.

tary by affected parties should winnow out useless proposed rules and tailor those that remain in such a way as to achieve maximum effectiveness, thereby allowing only necessary proposals to survive the rule development process and become permanent rules.¹⁴⁷ Thus, the rule development process already streamlines proposals, which supports Governor Chiles' goal. Adding awards of attorney's fees to further deter agency rulemaking is unnecessary.

Governor Chiles has never supported his claim that rulemaking is overly burdensome and expensive for state agencies. However, in 1995, in response to Chiles' anti-regulation sentiment, Florida agencies for the first time in history repealed more rules than they adopted.¹⁴⁸ The need for attorney's fees provisions to further deter rulemaking is questionable because the provisions are designed to address a problem—runaway agency rulemaking—that may not even exist. Additionally, people ignore the definite benefits of written rules for both the public and agencies. Rules are not always the enemy. Rather, the costs of eliminating rules may be the true hidden specter.¹⁴⁹

c. Risks of Phantom Government

The "ossification" of rulemaking carries the risk of reverting to the phantom regulation prevalent in pre-APA days.¹⁵⁰ Former Senator Dempsey Barron¹⁵¹ used the term "phantom government" to describe the time before the APA when "rules were kept in bureaucrats' desk drawers and only agency insiders knew them" and the public discovered them the hard way, by breaking them.¹⁵² Elimination of agency rules will not quell regulation because agencies would revert to making rules in the form of unwritten agency policies.¹⁵³

147. See Maher, *supra* note 1, at 345-46. The affected public is strongly represented in the rule development process and has a voice in new agency policies. See *id.* at 345.

148. See *id.* at 328.

149. See *id.* at 322. Written rules add certainty to any society. See *id.* at 335. With the onset of the computer age, public access to rules will increase, augmenting the benefits of written rules. See *id.* at 323. Additionally, rules protect the public from government by communicating agency policy and allowing opponents to challenge those policies. See *id.* at 331. For a further discussion of the benefits of rulemaking as opposed to policy by adjudication, see Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 769-73.

150. Rulemaking ossification, a byproduct of judicial review, can substantively "affect the pace and quantity of agency regulation." See Harold J. Krent, *Turning Congress Into An Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 741 (1996).

151. *Dem.*, Panama City, 1957-1988.

152. See Maher, *supra* note 1, at 329.

153. See Burris, *supra* note 115, at 668. If the Legislature builds barriers that inhibit agency rulemaking, then agencies will seek other alternatives for developing public policies. See *id.* But see FLA. STAT. § 120.535 (1995) (repealed and recodified 1996). This statute required agencies to adopt necessary rules through the rulemaking process and pro-

Such policies will not have the public input of policies that result from the APA rule development process and will be difficult for citizens to challenge.¹⁵⁴

VI. A PROPOSAL FOR ATTORNEY'S FEES IN THE APA: MAXIMIZING BENEFITS, REDUCING COSTS

The 1996 attorney's fees changes assure some true benefits, yet definite costs are present. Although some costs are inevitable, further modification of attorney's fees provisions could more effectively minimize costs and maximize benefits. Most important, eliminating certain elements from the rule challenge attorney's fees provisions would reduce financial costs dramatically, while not significantly affecting the positive goals of those provisions.

Section 120.595(2), Florida Statutes, which awards attorney's fees to challengers of defective proposed rules, greatly increases the potential for agencies to incur significant costs. Eliminating this provision would avert overdeterrence of agency rulemaking, thereby allaying concerns that Florida will revert back to the "phantom government" era. The overall financial costs of the 1996 attorney's fees changes also would decrease with the elimination of section 120.595(2). Additionally, eliminating this section would remove one of the litigation incentives, which would in turn reduce overcrowded court dockets.¹⁵⁵

vided citizens with a cause of action against an agency for failing to do so. See *id.* The statute also awarded attorney's fees to persons who successfully demonstrated that an agency is not permitted to rely on the statement for agency action. See *id.* Although the Legislature repealed this statute, its provisions were divided among sections 120.54(1)(a), 120.56(4), 120.595(4), 120.80(13)(a), and 120.81(3)(a) in the simplification process. See Act effective Oct. 1, 1996, ch. 96-159, § 10, 1996 Fla. Laws 147, 160-61; *id.* § 16, 1996 Fla. Laws at 182-83; *id.* § 25, 1996 Fla. Laws at 196; *id.* § 41, 1996 Fla. Laws at 208-09; *id.* § 42, 1996 Fla. Laws at 211.

In addition, section 120.57(1)(e), Florida Statutes, prevents agencies from relying upon unadopted rules by imposing attorney's fees when an agency "determines the substantial interest of a party" based upon an unadopted rule that is set aside. FLA. STAT. § 120.57(1)(e) (Supp. 1996). Thus, given this section, which deters policy-oriented adjudicatory decisions, and the ossifying effects of the rule challenge attorney's fees provisions, overall agency inaction will be the likely result.

These provisions help prevent unwritten rulemaking efforts by requiring agencies to promulgate rules through the rulemaking process. However, these provisions alone cannot prevent all phantom government. Agencies can still find ways to avoid putting rules through the rule development process. Thus, the rule challenge attorney's fees provisions will still encourage phantom government rulemaking.

154. See Maher, *supra* note 1, at 331 (claiming that written rules have become the "fall guy" for people's unhappiness with government policies).

155. By abolishing just one of the new ways to obtain attorney's fees under the APA, financial costs would be reduced to a more manageable level. Parties would still be able to obtain attorney's fees for successful challenges to existing rules and for frivolous appeals. See FLA. STAT. § 120.595(3), (5) (Supp. 1996).

Another cost-reduction measure involves changing the cap on attorney's fees, which is currently set at \$15,000 per action, excluding costs.¹⁵⁶ Because a blanket cap fails to affect the rates that attorneys bill per hour, it exerts less control over litigation bills. The rule challenge attorney's fees provisions should instead contain a reasonableness requirement fashioned to guard against excessive billing charges. A bright-line, per-hour fee standard would more effectively control attorneys' litigation charges. Furthermore, a bright-line standard would avoid the complex issues raised when calculating "reasonable" attorney's fees¹⁵⁷ and increase certainty for rule challengers seeking attorney's fees.¹⁵⁸

Many states use a cap of \$75 per hour in their EAJAs.¹⁵⁹ A \$100-per-hour fee with statutorily provided cost-of-living increases would provide a better incentive for persons to challenge rules. Although a \$100-per-hour cap probably would not cover all of the prevailing party's attorney's fees, agencies would still pay a substantial portion, thereby helping to equalize the playing field for private parties while minimizing agency expenses.

The substantial justification standard should be retained in the rule challenge attorney's fees provisions because the standard provides a valuable safe harbor for agencies and deters unnecessary attorney's fees litigation. The steep costs related to the substantial justification standard could be reduced by describing the standard more explicitly in section 120.595. Currently, section 120.595 provides that "[a]n agency's actions are 'substantially justified' if there was a reasonable basis in law and fact at the time the actions were taken by the agency."¹⁶⁰ This definition of the standard mimics the federal EAJA's definition of "substantially justified,"¹⁶¹ and the federal EAJA has undoubtedly contributed to an increase in litigation.¹⁶² Thus, duplication of the federal EAJA will produce the same litigious result, costing Florida agencies and the public valuable resources. A major source of litigation will be determining what is a "reasonable basis in law and fact," a determination the courts will

156. See *id.* § 120.595(2), (3).

157. See Olson, *supra* note 7, at 562.

158. Before deciding to challenge a rule, parties evaluate their chances of winning and their potential monetary awards. Parties also determine their potential risks, namely how much they might lose. A bright-line hourly attorney's fees cap would help rule challengers weigh their risk potential. Parties can more easily estimate the attorney's fees that an agency would be required to pay if a rule were overturned. See generally JOHN E. SHAPARD, *FED. JUD. CTR., THE INFLUENCE OF RULES RESPECTING RECOVERY OF ATTORNEYS' FEES ON SETTLEMENT OF CIVIL CASES* (1984), available in 1984 WL 62567 (describing an empirical study exploring the probability of settlement conducted at the Federal Judicial Center).

159. See Olson, *supra* note 7, at 562.

160. FLA. STAT. § 120.595(2), (3) (Supp. 1996).

161. See 28 U.S.C. § 2412(d)(1)(a) (1994).

162. See Krent, *supra* note 132, at 459, 479.

make at the public's expense.¹⁶³ Additionally, courts have considerable leeway when determining what is reasonable, which may lead to undesirable inconsistencies among Florida's district courts of appeal.¹⁶⁴

To mitigate substantial justification litigation, the Legislature should add a more precise definition of "substantial justification" to section 120.52, the APA's definition section. A better description of the substantial justification standard would furnish courts, litigants, and agencies with the additional guidance needed to lessen the amount of litigation, thereby cutting financial costs for all.

Simplifying the previously scattered attorney's fees provisions by compiling them in one section has made the provisions more accessible and is a notable improvement. All that is missing from a complete simplification of the APA attorney's fees provisions is the FEAJA, which should be moved into section 120.595. Currently, the FEAJA is the only major attorney's fees provision solely applicable to administrative proceedings that is not contained in section 120.595.¹⁶⁵ The addition of the FEAJA to section 120.595 would complete the reorganization of APA attorney's fees provisions and would contribute to a new, more understandable APA.

Awarding attorney's fees for successful challenges to existing rules will serve a valuable function by encouraging parties to challenge poorly drafted administrative rules that have a negative impact upon the public. The rule development process affords agencies a large window of opportunity to contemplate the effects of proposed rules. Because existing rules have already gone through the rule development process, agencies should take more responsibility for them.¹⁶⁶ If attorney's fees were awarded only to challengers of defective existing rules and not proposed rules, agencies could freely submit their proposals to the public while retaining the opportunity to examine the proposals more closely during the developmental process. Such a scheme would encourage agencies to explore creative ideas, but would ensure that they employ only the most useful ideas as permanent rules.

The remaining attorney's fees provisions guard against litigation initiated for an improper purpose or frivolous litigation in adminis-

163. See Olson, *supra* note 7, at 563.

164. Cf. *id.* at 575. Arizona courts interpret their state's EAJA provision strictly and deny awards of attorney's fees to more than half the claimants. See *id.* However, the Arizona statute does not contain a substantial justification standard for courts to use to safeguard agencies and the public treasury. See *id.* The narrow interpretation of state EAJA language by Arizona courts illustrates the leeway that courts have when construing ambiguous statutory language.

165. See generally Seann M. Frazier, *Award of Attorneys' Fees in Administrative Litigation*, FLA. B.J., July/Aug. 1995, at 74 (reviewing the three general ways to seek attorney's fees under the APA).

166. See discussion *supra* Part V.B.4.a. (describing the rulemaking process).

trative proceedings and appeals.¹⁶⁷ These fee-shifting provisions punish unjustified or undesirable behavior and serve an important deterrent function by discouraging misconduct in administrative litigation.¹⁶⁸ Thus, these sections should be maintained to deter bad faith litigation.

VII. CONCLUSION

The 1996 attorney's fees changes will achieve a number of positive goals. However, many of the attendant costs have potentially unfavorable effects. Several amendments to the new attorney's fees scheme would mitigate these costs without reducing the overall effectiveness of section 120.595. First and most important, the Legislature should repeal section 120.595(2), which awards attorney's fees to successful challengers of proposed rules. Second, the cap on attorney's fees should be changed from an overall fee cap to a per-hour fee cap. Third, the substantial justification standard should be more precisely defined. Finally, the FEAJA should be incorporated in section 120.595 for simplification purposes. Retaining the attorney's fees provisions for existing rules and frivolous litigation will yield worthy benefits and will not incur significant costs. If these proposals are realized, the APA attorney's fees provisions can achieve the goals for which they were created.

Many of the costs and benefits resulting from implementation of the 1996 attorney's fees changes apply to any effort to control agency actions and litigation patterns through attorney's fees. Thus, other states contemplating APA reform should weigh these costs and benefits when formulating attorney's fees provisions for their own APAs. After all, the best regulatory schemes result from many trials and failures, each contributing to a more perfect administrative scheme.

167. See FLA. STAT. § 120.595(1), (4), (5) (Supp. 1996).

168. See Rowe, *supra* note 82, at 660 (describing the rationale for punitive fee shifting).