ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES (DRAFT)

Meeting of July 27, 2000

Attendance:

A meeting of the Environmental Hearing Board Rules Committee was convened on July 27, 2000[1] at approximately 2:08 p.m. with Maxine Woelfling presiding. The following members were in attendance: Dennis Strain, Tom Scott, Rick Grimaldi, and Mike Bedrin and Howard Wein (who attended the meeting via conference call at the Environmental Hearing Board's Pittsburgh Office.) Representing the Board were George Miller, Michelle Coleman, and Tom Renwand (via Pittsburgh).

Comments on Proposed Rules:

The Committee discussed comments which the Board received from Attorney John Carroll on its recently proposed rules. The comments are set forth in a letter to the Board dated June 14, 2000. The Committee also discussed questions related to Mr. Carroll's comments presented by the Independent Regulatory Review Commission (IRRC) at a meeting on July 24, 2000 with George Miller and Michelle Coleman.

Regarding proposed rule 1021.24 (Referral of *Pro Se* Parties to *Pro Bono* Counsel), Mr. Carroll questioned why the *pro bono* program is limited to *pro se* litigants. In response, George noted that the program is not limited to *pro se* litigants. Maxine Woelfling questioned whether IRRC might require a wording change to make it clear that the program is not, in fact, limited to *pro se* litigants. Mike Bedrin stated that Mr. Carroll might be reading the rule as being limited to *individuals*. Maxine noted that, in that case, the rule would be inconsistent with the Board's rule on representation at § 1021.22.

The Committee determined that this question was also related to Mr. Carroll's second question, i.e., whether a candidate for *pro bono* representation needs to be a *party* before a referral can be made. George noted that if the person seeking representation is not a party within 30 days, the entire matter would be academic. He questioned why we should go through the referral process if the person does not intend to become a party. Maxine suggested referring to "persons" rather than "parties" in the first sentence of the proposed rule.

Mr. Carroll's third comment focused on whether it was sufficient that a candidate for *pro bono* representation merely *claim* not to be able to afford an attorney. He felt the candidate must be required to make some demonstration of need. George noted that this issue was also raised by IRRC. Maxine stated that the Board should not have to make the determination of financial need. Mary Anne Wesdock noted that IRRC raised this issue primarily with regard to subsection (a)(3) (relating to referral to "an individual attorney, law firm or organization whose name appears on the Board's register of attorneys who have volunteered to take on the representation.")[2]

Maxine suggested removing the concept of "*pro bono*" and "*pro se*" from the rule since referrals by a county bar association may be done on the basis of expertise and not simply as a pro bono matter. In addition, this would allow an attorney to handle the matter on a reduced fee basis, but not necessarily for free.

Tom Scott stated the issue as follows: Is the Board going to serve as a conduit for referrals or is it going to get involved in the actual monitoring and screening? If the

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[1] The regularly scheduled meeting of the Rules Committee on July 13, 2000 was cancelled due to inability to obtain a quorum and rescheduled to July 27, 2000.

latter, this is beyond what he believed the rule was intended to accomplish. Howard Wein agreed.

George stated that IRRC is not satisfied with the word "claim" and wants a clear statement that the applicant is indeed unable to afford an attorney. Howard noted, however, that before there is any evaluation of financial need, a potential party may need to file an appeal to protect his rights. George suggested use of the word "person" to address this situation.

Howard asked whether the Secretary to the Board will advise an applicant for a *pro bono* referral that he has only so much time in which to file an appeal. Maxine noted that this might turn into a *nunc pro tunc* situation and raise the question of whether there has been a breakdown in the operation of the Board. Howard agreed, noting that the case might not get into the hands of a lawyer until it is too late.

Tom Scott suggested providing a "means test" to every lawyer who agrees to take part in the program and the lawyer can then determine whether to take the case. Howard suggested using the means test utilized by the PBA Environmental, Mineral and Natural Resources Law Section (EMNRLS) *Pro Bono* Committee. George questioned whether we should get into this much detail in the regulation. He suggested that the Board should run the program with as much control as it can, while satisfying IRRC that the program will not be servicing people who can afford a lawyer.

Maxine suggested changing the title of the rule to eliminate "*Pro Se*" and simply refer to "Parties." Mike Bedrin asked what the Board would do if a *person*, not a party,

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[2] This subsection, as submitted to the *Pennsylvania Bulletin* for publication, originally read "*such* representation." Upon publication in the *Bulletin*, the Legislative Reference Bureau edited it to read "*the* representation."

called to be referred to a *pro bono* lawyer. George said the Secretary would refer him to the EMNRLS *Pro Bono* Committee.

George stated that he had suggested to IRRC that the Board would be willing to add the following language to subsection (b) of the rule: "No such referral shall be made without a demonstration that the applicant cannot pay attorney fees." He further stated that he did not want to create a financial eligibility test in subsection (b) but would merely inform IRRC that guidelines similar to those of the EMNRLS *Pro Bono* Committee will be referred to attorneys participating in the program under subsection (b).

Howard asked whether the rule should consider allowing attorneys to charge a reduced fee. George stated that it is his understanding that the EMNRLS was extremely sensitive on this issue and would not be in favor of it.

George stated that the way in which this rule will work is that (a)(1) (referral to the EMNRLS *Pro Bono* Committee) will always be the first choice. The Board will turn to (a)(2) (referral to a county bar association) if the EMNRLS *pro bono* program ceases to exist. Then only if the Board cannot get a referral through a county bar association will it turn to (a)(3) (referral to an attorney, law firm or organization on the Board's register of attorneys). For this reason, he did not feel the Board should create a "reduced fee" provision simply for (a)(3).

Maxine asked whether the rule should be amended to satisfy IRRC's concern regarding financial eligibility. George suggested making one of the following changes: Option 1 would be to amend subsection (a) to eliminate " who claim not to be able to afford a lawyer" and replace it with "who are able to demonstrate that they are not able to afford a lawyer." Option 2 would be to add the following language to subsection (b):

"No such referral shall be made without a demonstration that the applicant is not able to afford a lawyer."

Howard stated that he preferred the second option. Mike Bedrin noted that under the second option, the determination of financial need would only apply in situations under (a)(3) (referral to an attorney, law firm or organization on the Board's register of attorneys) and that this would allow the EMNRLS *Pro Bono* Committee and the county bar associations to do their own financial needs assessment. Howard agreed, stating that an applicant's "claim" of inability to afford an attorney would remain in place for (a)(1) and (2) (referrals to the EMNRLS *Pro Bono* Committee and county bar associations), and the Board would be involved in a financial evaluation only in the limited number of situations which might arise under (a)(3).

With regard to the title of proposed rule 1021.24, Howard suggested changing "Parties" to "Persons." Maxine recommended leaving in "Parties" but eliminating "*Pro Se*" from the title. Mike suggested changing the title to the following: "Referral to *Pro Bono* Counsel." The Committee agreed with the latter suggestion.

The Committee also agreed to adopt the language recommended by George in subsection (b): "No such referral shall be made without a demonstration that the applicant is unable to afford a lawyer."

The Committee next addressed Mr. Carroll's fourth comment, suggesting that subsection (a)(3) should be revised to read "…the Board's register of attorneys who have volunteered to *accept such assignments*." (This subsection currently reads "…the Board's register of attorneys who have volunteered to *take on the representation*.") George stated he believed "representation" was the appropriate word since it signifies a

relationship between the lawyer and the person being represented. The Committee agreed.

The Committee reviewed Mr. Carroll's remaining comments on proposed rule 1021.24 and determined that no further changes were required. The Committee also addressed IRRC's question of who will pay for any expenses which may be incurred. George advised IRRC that this is a matter to be addressed between the attorney and his client.

Howard Wein made a motion to amend proposed rule 1021.24 as follows:

> Amend the title to read "Referral to *Pro Bono* Counsel."
>
> Add the following language to subsection (b): "No such referral shall be made without a demonstration that the applicant is unable to afford a lawyer."

Rick Grimaldi seconded the motion. The motion passed unanimously.

The Committee next addressed Mr. Carroll's comments and IRRC's questions on proposed rule 1021.54 (Substitution of Parties). Mr. Carroll's first comment and IRRC's only question on this rule concerned whether the term "election" in subsection (a) referred to "choice" or "election to public office." Pa.R.C.P. 2351 which defines the term "successor" and which served as a basis in part for proposed rule 1021.54 indicates that the term "election" refers to election to public office. Therefore, George recommended revising subsection (a) to read "election to public office."

Mr. Carroll also questioned whether the last sentence of subsection (b) should refer specifically to § 1021.53(b)(2) rather than make a general reference to all of § 1021. 53 (relating to amendments to appeal.) The Committee agreed this was the intent of the proposed rule.

Howard Wein moved to amend proposed rule 1021.54 as follows:

In subsection (a), add "to public office" after "election."

In the last sentence of subsection (b), add "(b)(2)" after "1021.53."

Mike Bedrin seconded the motion. The motion passed unanimously.

With regard to proposed rule 1021.99 (Authority Delegated to Hearing Examiners), both Mr. Carroll and IRRC questioned whether the word "appoint" in the first sentence of subsection (a) should be replaced with the word "assign." George advised the Committee that he had discussed this matter with IRRC and had determined that "appoint" is the correct word. He noted, first, that there is no immediate need for the use of hearing examiners since the Board currently has a full complement of judges and a manageable caseload. He explained that if there were a slight increase in the Board's workload requiring the use of hearing examiners, the Board would be likely to assign the matter to an assistant counsel under the supervision of a judge. However, if the workload were to increase drastically, the Board would consider the appointment of someone not in the Board's employment to act as a hearing examiner, such as a former administrative law judge.

Both Mr. Carroll and IRRC questioned the use of the phrase "dispose of procedural matters" in subsection (a)(4). Mr. Carroll felt the use of this phrase was too broad and it should be deleted from the subsection. IRRC questioned whether it should be replaced with "rule on procedural matters." George recommended keeping the phrase as is. He stated that use of the word "rule" implies that the hearing examiner could not rule on any objection, including rulings from the bench, without first obtaining the approval of the Board Member to whom the case is assigned.

The Committee agreed that no changes were required to proposed rule 1021.99.

Electronic Filing:

The Committee reviewed a draft of a proposed rule on electronic filing, as well as the following documents: Temporary Guidance for Electronic Filing (to be used during the pilot project), Instructions for Electronic Filing, and a form letter to be used to register for electronic filing.

The proposed form letter for registration states that it must be submitted on "Attorney or Organization Letterhead." The Committee questioned use of the word "Organization." Maxine suggested "Counsel/Attorney's Letterhead." George agreed to make this change.

The registration form letter states, "I agree to accept service electronically in all cases except as I may designate by an amendment to this registration statement from time to time." Howard stated that the electronic filing program might get more participation if lawyers are able to register for particular cases rather than having to register for all cases and then opt out of particular cases by amendment. He explained that an attorney may have some clients who are willing to participate in electronic filing and others who are not. He suggested allowing attorneys to file a registration statement with each case in which they wish to file electronically, but keep the same password.

George questioned whether attorneys would want to have to file a registration statement with each case. Howard stated he would prefer to do it this way and noted that the registration statement could be filed with the notice of appeal or entry of appearance. He suggested that the registration statement be titled "Registration Statement for Electronic Filing for _____ (caption and docket number)." George questioned

whether this would interfere with the assignment of passwords since the system is designed to assign a new password each time a registration statement is filed.

Tom Scott recommended using whatever mechanism works best for the people who will be administering the system. George noted that the critical issue initially is to get people to use the system. He agreed to check with Brett Amdur of Verilaw and Board Secretary William Phillipy to see how registration in individual cases can be handled from an administrative standpoint.

Howard raised a question about the transmittal of documents in converted formats, such as from WordPerfect to Word. He noted that glitches can occur, for example with the numbering of paragraphs. George explained that this will not occur with documents filed electronically with the Board since all documents will be converted directly to PDF. The documents will look the same upon receipt as they do at the time of transmittal.

The Committee next considered George's proposed amendments to the Board's rules relating to electronic filing. With regard to definitions (in § 1021.2 of the rules), George proposed a definition of "legal document" which included the following phrase: "A motion, answer or other paper filed in a proceeding before the Board other than a notice of appeal or a complaint that is original process naming a defendant or defendants." Howard suggested amending this to read as follows: "A motion, answer or other paper filed in a proceeding before the Board other than a notice of appeal or a complaint *or a petition* that is original process [remainder of sentence deleted]."

Based on the change made to the registration statement discussed earlier, it was also suggested that the definition of "registration statement" be amended to read, "A

statement made on *the attorney's* letterhead…" as opposed to "A statement made on professional or organizational letterhead…"

George also proposed several amendments to the Board's existing rule 1021.30 (Filing). Proposed subsection (f) to this rule would read in relevant part, "Hard copy of any electronically filed legal document which exceeds 25 pages in length must also be filed with the Board in accordance with subparagraphs (a) through (c) of this rule and 25 Pa. Code § 1021.35 relating to the required number of copies." George explained the purpose of this provision is so that the EHB staff will not be burdened with having to print a "basketful" of documents at any time. Howard asked whether the 25 page limit included exhibits or simply the body of the document. It was agreed that proposed subsection (f) would be amended to read "…which exceeds 25 pages in length (including exhibits)…."

Existing rule 1021.35 requires that parties file multiple copies of certain documents with the Board. At the May 11, 2000 meeting, the Rules Committee voted to amend this rule to clarify when multiple copies of documents must be filed. Maxine asked whether electronic filings would be subject to this rule. George stated that electronic filings would not require multiple copies. The Committee agreed that § 1021.35, as amended at the May 11 meeting, should include a statement that electronic filings are not subject to this rule. George asked Mary Anne Wesdock to make this change in the amended rule.

As a point of clarification, Mike Bedrin asked whether *pro se* parties would be permitted to file electronically. George stated that they would not be able to do so.

Tom Scott pointed out that with electronic filing the concept of a "case file" is lost. That is, one cannot go to a physical location and find everything that has been filed in a case. This would be particularly true in a case where one party is filing everything electronically (except documents over 25 pages), one party is filing nothing electronically and one party is filing some things electronically and some things in hard copy. George said he believes much of the usage of electronic filing will be for motions for extensions or other similar "minor" motions, rather than motions for summary judgment and responses thereto. Electronic filing will simply offer a convenience to people if they want to use it. Tom Scott said he was more concerned with major filings, such as when a party files a motion for summary judgment in hard copy and the opposing party files a response electronically.

Mike Bedrin noted that at a prior meeting, Bill Phillipy had indicated that the Board would continue to maintain a complete file of all cases for archiving purposes. George stated that he would check with Bill about the Commonwealth's archiving requirements. He further stated that Bill Phillipy would be available at the next meeting of the Rules Committee to answer technical questions about electronic filing. Howard suggested having a demonstration in front of a computer terminal if the pilot project is up and running by that time.

Attachment of Proposed Order to Motions and Responses:

The Committee reviewed proposed additions to rules 1021.70 and 1021.71 which would require that proposed orders be attached to motions and responses. The additions to the rules would require that motions, responses and requests for extensions and continuances "…shall be accompanied by a proposed order which, if entered by the

Board, would grant the relief requested." Dennis Strain noted that the Board cannot generally grant relief to a response. The Committee suggested deleting the rest of the sentence after the word "order."

Thus, the proposed revisions to the rules would read as follows:

§ 1021.70 (b) Motions and responses shall be in writing, signed by a party or its attorney and shall be accompanied by a proposed order.

§ 1021.71 (e) Requests for extensions or continuances, whether in letter or motion form, shall be accompanied by a proposed order.

Howard Wein moved to adopt the amendments to rules 1021.70 and 1021.71 set forth above. Tom Scott seconded. The motion passed unanimously.

Administrative Matters:

Howard suggested sending a copy of the minutes of this meeting to John Carroll to advise him how the Committee addressed his comments to the proposed rules. George suggested doing so after the Board received and considered IRRC's final comments, in the event that further changes needed to be made.

Next Meeting:

Due to a DEP staff meeting on September 14, 2000 which will be attended by three members of the Rules Committee, the next meeting will be held on **September 21, 2000** from **12:30 to 4:30** p.m.