ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of March 23, 2022

Attendance:

The Environmental Hearing Board Rules Committee met on Wednesday, March 23, 2022[1] at 10:00 a.m. Rules Committee Chairman Howard Wein presided. The following Committee members attended: Brian Clark, Phil Hinerman, Matt Wolford, Jean Mosites, Tom Duncan and Doug Moorhead. Attending on behalf of the Board were Chairman and Chief Judge Tom Renwand, Judge Steve Beckman, EHB Counsel Eric Delio, Alisha Hilfinger and Maryanne Wesdock, and Board Secretary Christine Walker. Ms. Wesdock and Ms. Hilfinger took the minutes.

Minutes of January 13, 2022 Meeting:

Ms. Mosites, Mr. Clark and Mr. Wein noted corrections to the minutes of the January 13, 2022 meeting. On the motion of Mr. Clark, seconded by Ms. Mosites, the revised minutes were approved. Mr. Clark thanked Ms. Hilfinger and Ms. Wesdock for preparing detailed minutes of the Committee's discussions. He noted that the level of detail allows the discussions to transition smoothly from one meeting to the next.

Rules Package 106-13:

Due to a hearing scheduled in one of Judge Renwand's cases from April 5-May 20,[2] Ms. Wesdock is planning to schedule delivery of the final form rulemaking package to allow for

[1] This was a rescheduling of the regularly scheduled meeting date of March 10, 2022.
[2] The dates of the hearing were slightly modified after the meeting and ultimately canceled due to a settlement reached between the parties.

attendance at the IRRC public hearing of June 16, 2022. This means the rules package will be delivered to the legislative committees and IRRC in mid to late-April.[3]

Mr. Wein asked whether the rule changes would be discussed at the PBI Environmental Law Forum (ELF). Mr. Delio will be one of the presenters at the Forum. Along with John Herman and Scott Gould, he will be presenting the following program: "Litigating Appeals Before the Environmental Hearing Board." He intends to include a brief discussion about the upcoming rule changes, in particular, the changes to the nunc pro tunc rule, as well as the proposed changes to the attorneys' fee rules that will be part of the next rules package. He will also discuss the changes recently made to Pre-Hearing Order No. 1 (PHO1). Ms. Mosites suggested including the date of revision on PHO1 since many practitioners who are already familiar with the order may not notice that it has been revised. Ms. Wesdock stated that the most recent version of PHO1 will carry a revision date, and a notice will be posted on the Board's website.

Mr. Clark raised a concern that more seasoned practitioners may not attend the session on litigating an appeal before the Board and, therefore, they will not be made aware of the rule changes. He suggested publicizing that the program will include a discussion of upcoming rule changes. Mr. Delio noted that the program is not listed under the Basic Track and, therefore, more experienced practitioners may attend it. Additionally, the rule changes will be included in the ELF course materials. In response to Mr. Clark's concern, Ms. Wesdock will also post a notice on the PBA Environmental and Energy Law Section listserv prior to publication of the rule changes in the Pa. Bulletin.

Model ESI Plan:

[3] The rules package delivery took place on April 25, 2022.

During the last Rules Committee Meeting, the Committee had a robust discussion surrounding the Model ESI Plan with the objective of creating a single comprehensive Model ESI Plan available on the Board's website. Ms. Mosites reported that she had made minor changes since the Committee's last discussion. She recapped that the Committee was mostly in agreement with the current draft of the Model Plan and that brackets had been placed around portions of the model's content to indicate that the material was optional. Mr. Moorhead had reviewed the language from paragraphs 7, 8 and 10 of the Model Plan to consider whether the proposed language would be suitable to the Department. Paragraph 7(a)(iii), which concerns the collection of ESI, reads as follows: "Counsel for the Parties will assume the obligation for the collection of ESI from shared data sources." Because the Department utilizes various shared data sources and a variety of individuals gather such information, this section was of particular importance for the Department to consider. Mr. Moorhead stated that the proposed language of paragraph 7(a)(iii) was acceptable to the Department and that counsel could coordinate the gathering of ESI. No other Committee members took issue with Paragraph 7's language.

Ms. Mosites moved on to paragraph 8 of the ESI plan entitled "Discovery Requests and Responses." During the last meeting, the Committee contemplated whether ESI discovery needed to be separate from other discovery requests. The current version of paragraph 8(a) that Ms. Mosites prepared reads in part as follows: "Discovery requests that require a search or production of ESI may be separate from other requests…" Ms. Mosites explained that she changed "shall" to "may" in order to convey that ESI requests do not need to be separate from other discovery requests. Mr. Moorhead stated that most requests the Department receives involve looking at electronic records so the Department did not take issue with that change. The other Committee members were also fine with that proposed change.

The final issue the Committee considered regarding the Model ESI Plan concerned paragraph 10(a) which addresses privilege logs. During the last meeting the Committee discussed what needed to be listed in a privilege log. In particular, the Committee examined the question of whether correspondence on which an attorney was copied needed to be included in a privilege log. The following language had been proposed in paragraph 10(a)(v): "Parties are not required to include in their privilege logs ESI on which counsel is copied." This language had been borrowed from other models currently available on the Board's website. The language was placed in brackets to indicate it was up to counsel to decide whether to include it in their ESI Plan. Mr. Hinerman expressed reservations about the wording of this section. He stated that he has observed situations in which attorneys are copied on correspondence for the sole purpose of creating privileged information. He suggested that it would be better to use language such as "parties are not required to include in their privilege logs ESI communication solely between the attorney or the client" rather than language which indicates that any correspondence on which an attorney is copied is privileged. In the alternative, Mr. Hinerman preferred that the section be deleted or that it include a recitation of what attorney-client privilege is.

Ms. Mosites posed the question to the Committee whether it wished to delete the section on privilege logs or attempt to revise it. Mr. Duncan asked for clarification regarding the brackets; he asked if language which appeared in brackets meant that both parties would need to agree to include that language. Ms. Mosites affirmed that was the purpose of the use of brackets. Mr. Duncan stated that because the proposed language was enclosed in brackets, he did not see the harm in including that language as-is since the parties would need to agree to it anyway. Mr. Hinerman stated that he felt that even if the language appeared in brackets, it created an appearance of an endorsement of that language. He stated that he did not wish to endorse the language, nor

did he feel it was accurate. Mr. Wolford agreed with Mr. Hinerman and stated that he saw the language as an endorsement. He further felt that the language suggested that anything counsel was copied on was deemed to be privileged, which he believed to be an incorrect assumption. Mr. Wolford felt that what section 10(a) contemplates is a discussion of information that would go into a privilege log.

Mr. Wein asked Mr. Hinerman if his suggestion was to remove the section completely. Mr. Hinerman responded that it should be either removed or corrected. To make the section correct, Ms. Mosites asked if Mr. Hinerman was suggesting language such as, "parties are not required to include in their privilege logs ESI to or from counsel." Mr. Hinerman clarified that it should more accurately read "to or from counsel and the client." Mr. Wein raised the issue of how the instruction and consultation of certain work on behalf of a client for purposes of litigation would be covered. Mr. Hinerman stated that those communications would be included in a privilege log. Mr. Wein asked if what Mr. Hinerman was suggesting was a narrow exception for a direct communication between counsel and client. Mr. Hinerman stated it would include the counsel, client and the counsel's experts that are retained for purposes of assisting in rendering legal advice. Mr. Hinerman said that for the section to be precise and correct it would need to state "communications solely between counsel to clients and any experts retained by counsel for assistance in rendering legal advice." Mr. Wein agreed that statement was more accurate.

Mr. Moorhead stated that he viewed this section as a placeholder for the parties to agree on other items that are not contained in the privilege log. He suggested using more generic language. Mr. Moorhead explained that he saw this section as an opportunity for the parties to discuss what not to include in a privilege log. Mr. Duncan and Mr. Wolford agreed with this suggestion. Mr. Wolford suggested the section needed a catchall that involved any other things

the parties may agree that they do not need to include in the privilege log but that those exclusions must be expressly put in writing. Mr. Moorhead stated that including a catchall in brackets would indicate possible topics to discuss between the parties. Mr. Hinerman agreed that this suggestion made more sense than leaving a blank bracket. Ms. Mosites read back the revision of paragraph 10(a)(v) to the Committee which provided "Parties are not required to include in their privilege logs ESI [any other ESI for which the parties agree in writing need not be included]."

While he stated that it was not technically needed, Mr. Wein recommended that a vote be taken on the new Model ESI Plan in order to indicate the Committee's willingness to accept it as the new Model Plan. Mr. Duncan stated that he wanted to clarify that the new Plan acts as a suggestion meant to be negotiated by the parties and that casting a vote in support of the Plan does not lock anyone into a position as a practitioner at a later date. Ms. Mosites agreed with Mr. Duncan's sentiment and also emphasized the importance of the disclaimer at the beginning of the Model ESI Plan that states the Plan is not endorsed by the Board and that variations should be considered based on individual cases. It was agreed that a revised date should be added to the Model ESI Plan.

Ms. Mosites moved that the Committee reflect its agreement with the revisions to the draft Model ESI Plan for posting on the Board's website and for the removal of the existing plans currently posted on the Board's website. The motion was seconded by Mr. Wolford, and the Committee voted in favor of the motion. Mr. Wein asked Ms. Wesdock if the effective date shown on the Model ESI Plan should be the same date that the Plan gets posted to the Board's website. Ms. Wesdock replied that the effective date would be the day that the Plan is put into operation. She explained that because the Model Plan will be posted by the Board's website contractor, the Board has no control over the posting date. She asked Ms. Mosites whether she would circulate

the revised Model Plan that included the changes that were agreed upon today. Ms. Mosites stated that she would circulate both a clean and a redlined version. Ms. Wesdock stated that once the Plan was recirculated and the Committee had a chance to review it again to be sure they agreed with its approval, the Board would post it. She informed the Committee that it could be some time before it appeared on the Board's website because the Board's contractor uses a new system for posting items that sometimes takes several months. Ms. Mosites stated that she would include today's date on the Model ESI Plan and then it could be revised as appropriate when ready for posting.

Notice to Interested Parties/Schneiderwind:

At the January 13, 2022 meeting, the Committee was unable to reach a consensus on proposed revisions to 25 Pa. Code § 1021.51 (Commencement, form and content [of a notice of appeal]). Mr. Moorhead volunteered to work on new revisions to subsections (h)(2) and (j) of 1021.51. Mr. Moorhead's proposed revisions are set forth below. Previously proposed revisions, set forth in the draft presented by Mr. Delio at the January 13 meeting, are marked in red, and Mr. Moorhead's suggested changes are marked in blue:

(h) For purposes of this section, a "potentially adversely affected person" ~~recipient of the action~~ includes the following:

(1) The recipient of a permit, license, approval, certification or order.

(2) ~~Any affected municipality, its municipal authority and the proponent of the decision, when applicable,~~ **I**~~i~~n appeals involving a decision under section 5 or 7 of the Pennsylvania Sewage Facilities Act (35 P. S. § § 750.5 and 750.7), **any affected municipality, its municipal authority, the proponent of the decision, when applicable, and any municipality or municipal authority whose official plan may be affected by the decision or a decision of the Board in the appeal**.

(3) A mining company, well operator, or owner or operator of a storage tank in appeals involving a claim of subsidence damage, water loss or contamination.

(4) Other interested persons ~~parties~~ as ordered by the Board.

(i) The service upon the recipient of a permit, license, approval, certification or order, as required under subsection (h)(1), shall subject the recipient to the jurisdiction of the Board, and the recipient shall be added as a party to the ~~third party~~ appeal without the necessity of filing a petition for leave to intervene under § 1021.81 (relating to intervention). The recipient of a permit, license, approval, certification or order who is added to an appeal under this section shall still comply with § § 1021.21 and 1021.22 (relating to representation; and notice of appearance).

(j) Other ~~potentially adversely affected~~ persons ~~recipients of an action~~ under subsection (h)(2) **or** (3) ~~or (h)(4)~~ may intervene as of right ~~course~~ in the appeal by filing an entry of appearance within 30 days of service of the notice of appeal in accordance with § § 1021.21 and 1021.22, without the necessity of filing a petition for leave to intervene under § 1021.81. **Intervention of persons identified under (h)(4), above, shall be in accordance with § 1021.81 unless otherwise specified in the order of the Board under (h)(4).**

Mr. Wolford questioned the language "proponent of the decision" set forth in (h)(2). Mr. Moorhead gave the following example: In the case of a private request, the proponent would be the landowner, i.e., the person submitting the private request. Mr. Wolford pointed out that if the municipality denies the request, then the landowner is the opponent, not the proponent, of the decision. Mr. Wein suggested using the language "proponent of the request." Mr. Moorhead agreed.

Mr. Moorhead explained the proposed changes to (j) and specifically the manner in which intervention would be handled. Ms. Wesdock felt that Mr. Moorhead's proposed changes addressed the concerns of both the Board and the Department that were expressed at the last meeting. The Department had expressed a concern that the previously proposed language inappropriately broadened intervention, whereas the Board expressed concern over limiting its ability to encourage intervention in a *Schneiderwind* situation.

Mr. Delio raised a concern regarding the newly added last sentence to (j): "Intervention of persons identified under (h)(4), above, shall be in accordance with § 1021.81 unless otherwise specified in the order of the Board under (h)(4)." He stated that if the Board determines someone is an interested person, the Board is unlikely to ask them to go through the steps of 25 Pa. Code § 1021.81 to intervene in the appeal. The Board will simply allow the person to intervene by entering his or her appearance, as is the case under the current rule. Mr. Moorhead felt that there may be instances where an interested person should not necessarily have the right to intervene; in those cases, the person should be required to go through the steps of filing a petition to intervene pursuant to 1021.81.

Ms. Wesdock felt that there are two categories of "interested persons:" 1) those who should be allowed to automatically intervene as a party – i.e., the *Schneiderwind* issue; and 2) those persons who have an interest in the appeal, but who should not necessarily be allowed to intervene as of right – i.e., the issue raised by Mr. Wolford regarding providing notice to interested persons. She felt that Mr. Moorhead's language in (h)(4) addressed both types of interested persons – it requires the interested person to go through the normal channels of intervening in an appeal (i.e., compliance with 25 Pa. Code § 1021.81), while also giving the Board flexibility to allow intervention as of right when it believes it to be appropriate.

Mr. Delio discussed one of Judge Coleman's cases that he had mentioned at a previous meeting. In that case, the Board required the appellant to serve the notice of appeal on someone the Board deemed to be an interested person. The Board permitted that person to intervene as of right but did not require intervention.

Mr. Duncan felt that Mr. Moorhead's language was beneficial to the Board. Without that language the Board might be hesitant to order an appellant to provide notice of an appeal to an

interested person out of concern that it would be seen as creating an automatic right of intervention. Ms. Wesdock agreed. She noted that (h)(4) was originally created solely to deal with the *Schneiderwind* issue and now it was being expanded to address Mr. Wolford's issue of providing notice to interested persons. Mr. Delio did not believe that (h)(4) was being expanded by simply changing "recipient of an action" to "potentially adversely affected persons."

Mr. Wein felt that it was important to give the Board flexibility to determine how someone should intervene – whether as of right or via the process set forth in 25 Pa. Code § 1021.81. Ms. Mosites pointed out that subsections (h)(1)-(4) define who must be served with a copy of a notice of appeal. She felt that (h)(4) should be broad enough to capture the types of entities covered by (h)(2)-(3). She asked about the manner in which the Board utilizes (h)(4) – does the Board order the person to be part of the appeal or does it simply order the appellant to provide notice of the appeal to that person? Ms. Wesdock stated that both scenarios have occurred. Mr. Delio stated that he interprets (h)(4) as allowing the Board to order an appellant to serve a copy of the notice of appeal on the interested person and to direct the appellant to provide a certificate of service to the Board. In that case, Ms. Mosites felt that (h)(4) had more to do with serving notice than intervening. Therefore, she felt that the intervention language added to (j) by Mr. Moorhead was helpful since intervention is not addressed elsewhere in Section 1021.51.

Mr. Wolford directed the Committee's attention to Section 1021.51((f)(2)(vi) which discusses who needs to be served with a copy of the notice of appeal when the appeal is filed conventionally (i.e., by mail or personal delivery). The section currently requires service on (A) the office of the Department issuing the action; (B) the Department's Office of Chief Counsel; and (C) the recipient of the action in a third-party appeal ("potentially adversely affected person" under the proposed revisions). Mr. Wolford suggested adding the language of (h)(4) to (C), i.e., requiring

service of the notice of appeal on "persons ordered by the Board." However, because (h)(4) is not implicated until there is an order from the Board, Ms. Mosites pointed out that it could not be added to the service list for a notice of appeal.

With regard to (C) above – i.e., requiring service of a notice of appeal on the recipient of the action (potentially adversely affected person) in a third-party appeal - Mr. Hinerman raised a potential issue. Section 1021.51(f)(2)(vi)(C) requires an appellant to serve the notice of appeal either at the address listed in the Department action or "at the chief place of business in this Commonwealth" of the recipient. He felt that most third-party appellants were unlikely to look up the chief place of business of the recipient in the Commonwealth. He suggested substituting the following language: "at the address of the designated agent for service of process." Therefore, Mr. Hinerman's proposed revision would read as follows:

> (C) Any potentially adversely affected persons as identified in subsection (h)(1)-(3). The service shall be made at the address in the document evidencing the action by the Department or at the ~~chief place of business in this Commonwealth of the person~~ **address of the designated agent for service of process**.

There was discussion about individuals who might not have a designated agent. There was no consensus among the Committee to change the current language.

Mr. Delio circled back to the suggestion at earlier meetings to replace "recipient of the action" with "potentially adversely affected person." He recognized that some members of the Committee felt the term was confusing and he inquired as to whether a better term could be agreed upon. Mr. Clark suggested "potentially aggrieved" since it tracks the language of statutes creating a right of appeal to the Environmental Hearing Board. Mr. Delio agreed with Mr. Clark that "aggrieved" seemed to be a cleaner term, but he noted that the subcommittee tasked with looking at revisions to Section 1021.51 had come up with "potentially adversely affected persons" based

on the language of Section 4(c) of the Environmental Hearing Board Act which states that "no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board…" 35 P.S. § 7514(c).

Mr. Wein suggested voting on the revisions proposed by Mr. Moorhead, and if any member of the Committee or the Board comes up with new language they can bring it to the attention of the Committee. Mr. Hinerman moved to adopt the proposed revisions to Section 1021.51 with the proviso that "potentially adversely affected person" could be revised. Mr. Moorhead seconded. The Committee voted unanimously in favor of the revisions. Mr. Moorhead agreed to circulate the recommended changes.

Mr. Wolford also recommended looking at the language of Sections 5 and 7 of the Sewage Facilities Act, referenced in Section 1021.51(h)(2).

Sanctions:

The discussion regarding sanctions had been raised at a prior Rules Committee meeting but had been tabled due to lengthy agendas at subsequent meetings. The question raised was whether the Board's rules on sanctions should be clarified. It was noted that both Sections 1021.161 (sanctions) and 1021.31 (signing) deal with the issue of sanctions.

Mr. Duncan noted that the Pennsylvania Supreme Court had recently heard oral argument in the case of *Clean Air Council v. DEP and Sunoco Pipeline, L.P.*, 2019 EHB 228, in which a majority of the Board denied the appellant's petition for attorney's fees against Sunoco. The Board held that attorney's fees could only be awarded against a permittee under the Clean Streams Law upon a showing of bad faith. The Commonwealth Court affirmed the Board, and the case was appealed to the PA Supreme Court. Mr. Duncan raised a question as to whether the Supreme Court's ruling might have an impact on the issue of sanctions since the question before the court

was the standard to be applied in awarding attorney's fees against a permittee. Judge Renwand thanked Mr. Duncan for raising the *Sunoco* case, but he felt that the Committee could go forward with its discussion about sanctions without waiting for a ruling from the Supreme Court. He reasoned that the Committee's discussion centered on the interaction between the Board's rules on signing (1021.31) and sanctions (1021.161), which was not an issue in the *Sunoco* case.

Section 1021.161 reads as follows:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

Mr. Wein stated that because the Board's rule on sanctions references Pa.R.C.P. 4019, dealing with discovery, there is a concern that the Board's rule could be read as being limited to discovery violations. Mr. Duncan suggested changing the last sentence to read as follows:

> The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, ~~or other appropriate~~ sanctions ~~including those~~ permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters) **or other appropriate sanctions**.

Ms, Mosites agreed with Mr. Duncan's suggested language. Mr. Wein suggested changing "permitted" to "enumerated." Mr. Duncan suggested eliminating "including those permitted" and simply saying "sanctions under Pa.R.C.P. 4019."

Ms. Mosites stated that she believes all the sanction tools are available to the Board under the current language of the rule but agreed that it makes sense to make the rule clearer. Judge Renwand agreed. He stated that the rule on sanctions will rarely be applied by the Board, but for those rare times when it is applied it is important to ensure that the rule is clear.

Mr. Wein asked for the Board's viewpoint. Judge Beckman suggested simply placing a period after "sanctions" and eliminating the reference to Pa.R.C.P. 4019 as follows:

> The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions ~~including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters)~~.

He felt that the last phrase referencing Pa.R.C.P. 4019 introduces ambiguity. He felt that the phrase "other appropriate sanctions" gives the Board broad authority and the last portion of the sentence is not needed. Mr. Wein felt that it was important to keep the reference to Pa.R.C.P. 4019 because it lists various types of sanctions. Judge Beckman stated that when he has imposed sanctions he has never looked to Pa.R.C.P. 4019 for guidance. He sees the reference to Pa.R.C.P. 4019 as an add-on to authority that the Board already has. Judge Beckman pointed out that the Board does not sanction parties very often. He stated that the most frequent situations in which sanctions are applied are dismissing an appeal for failure to respond to Board orders and prohibiting testimony for failure to disclose a witness. He believes that Section 1021.161 gives the Board the authority to deal with all situations requiring sanctions.

Mr. Wein suggested adding the following language: "including **but not limited to** those permitted under Pa.R.C.P. 4019…" Mr. Delio stated that he had no strong preference with regard to leaving the reference to Pa.R.C.P. 4019 in the rule or taking it out. He felt that leaving the reference in the rule signals that it is available for the Board's use.

Ms. Mosites suggested adding the following language to the first sentence of Section 1021.161: "**Upon motion or sua sponte,** the Board may impose sanctions upon a party…" Judge Beckman stated that he felt it was implied in Section 1021.161 that the Board could act either on a motion or on its own. He was concerned that adding too much language to the rule could create

arguments that don't exist. He was agreeable to adding the language but did not feel it was necessary to do so. Mr. Wolford agreed with Judge Beckman; he did not oppose adding the language if the Committee felt that it added clarification but did not believe it was necessary. Judge Renwand agreed with the language suggested by Ms. Mosites. He felt that it was beneficial to clarify that the Board can take action on its own. He noted that the Board is sometimes criticized for acting sua sponte and, therefore, it would be helpful for the rule to make it clear that the Board has the power to act on its own.

Mr. Wein suggested a slight variation on Ms. Mosites' proposal as follows: "The Board**, by motion or sua sponte,** may impose sanctions upon a party…" Judge Beckman reiterated that he did not feel the additional language was necessary but he did not oppose it.

The Committee next returned its focus to the last sentence of Section 1021.161 containing the reference to Pa.R.C.P. 4019. Mr. Wein suggested the following revision: "The sanctions may include…or other appropriate sanctions including **but not limited to** those ~~permitted~~ **identified** under Pa.R.C.P. 4019…" Ms. Mosites stated that she liked the revision proposed earlier by Mr. Duncan:

> The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, ~~or other appropriate~~ sanctions ~~including those permitted~~ under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters) **or other appropriate sanctions**.

Mr. Duncan stated that he was fine with either the language proposed above or the suggestion proposed by Judge Beckman to simply end the sentence with "other appropriate sanctions" and delete the reference to Pa.R.C.P. 4019. He felt that the reference to Pa.R.C.P. 4019 was purely advisory.

The Committee agreed to take an informal vote among the Committee members to determine which set of revisions had the most support. Mr. Moorhead abstained from the vote on behalf of the Department since the Department is involved in cases currently before the Board in which sanctions have been requested. There were 5 votes in favor of removing the reference to Pa.R.C.P. 4019: Mr. Clark, Mr. Duncan, Mr. Hinerman, Mr. Wolford and Mr. Wein. Ms. Mosites voted in favor of keeping the reference to Pa.R.C.P. 4019 in the rule, but she stated that she was not opposed to removing it. On the motion of Mr. Wolford, seconded by Mr. Clark, the Committee recommended the following revision to Section 1021.161:

> The Board**, by motion or sua sponte,** may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions**.** ~~including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters)~~.

The vote was unanimous, with Mr. Moorhead abstaining.

Next Meeting:

The next meeting of the Rules Committee is scheduled for Thursday, May 12, 2022 at 10 a.m.

Adjournment:

On the motion of Ms. Mosites, seconded by Mr. Wolford, the meeting was adjourned at 12:03 p.m.