

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

Meeting of September 9, 2004

Attendance:

The following members of the Rules Committee attended the meeting on September 9, 2004: Rules Committee Chairman Howard Wein, Maxine Woelfling, Dennis Strain and Brian Clark. Representing the Board were EHB Chairman and Chief Judge Michael Krancer, Judge Thomas Renwand, Judge Bernie Labuskes and Assistants Counsel Connie Wilson and MaryAnne Wesdock.

Approval of Minutes:

The minutes of the July 15 meeting could not be approved due to a lack of a quorum. They will be voted on at the November meeting.

Expert Discovery:

The Rules Committee entertained a request by attorney Matt Wolford to consider whether the rules on expert discovery should be revised. Mr. Wolford participated in the meeting by telephone.

Under the Board's current rules and case law, any party, including the Department, who intends to introduce expert testimony at the hearing must produce an expert report for that witness. In a case in which he is involved, Mr. Wolford had engaged in discovery with the Department in which he asked for certain information regarding how the Department reached the decision which was the subject of the appeal. He was told that information would be in the expert report.

Mr. Wolford felt that a distinction should be drawn between 1) facts that support an expert's opinion, which should be treated as expert discovery and 2) facts that led up

to the Department's decision, which he felt should be treated as non-expert discovery. In other words, he felt that anything that happened prior to the Department reaching its decision should be considered factual and subject to non-expert discovery, and anything formulated after the appeal is filed would be covered by Pa.R.C.P. 4003.5 and subject to expert discovery.

In a prior meeting, Mr. Strain had proposed that Department witnesses be subject only to deposition and not the filing of expert reports. Mr. Wolford felt that would solve much of the problem but not all of it since he would want to be able to obtain some factual information prior to deposing the witness.

Mr. Wolford felt that even if the Department made its decision using expertise, that should be discoverable in the normal course of discovery and not subject to expert discovery. Ms. Woelfling pointed out that much of the same expertise used in making the initial decision is going to be used at the hearing to support the witness' opinion and questioned where the line should be drawn.

Judge Renwand also felt it would be difficult to draw a line between expert facts formulated prior to the Department's action and those developed after an appeal is filed. He felt that could lead to multiple depositions of Department experts. He related that in one of his cases that was heavily dependent on expert testimony the parties worked out a joint case management order in which they first engaged in factual discovery, then the appellant filed its expert reports, followed by the appellant's experts being deposed. The Department and permittee then filed their expert reports, followed by their experts being deposed. Finally, each side was given an opportunity to amend its expert reports.

Judge Renwand also pointed out that in his cases when the parties ask for an extension of the discovery period, he doesn't automatically extend all of the other deadlines, such as for the filing of expert reports. He further noted that the rule allowing the filing of expert reports after the completion of factual discovery was set up for the benefit of appellants, in order to allow appellants additional time to retain an expert.

Mr. Wolford felt that an appellant should be entitled to information early in the process with regard to how the Department reached its decision. Mr. Strain felt this would be no different than when the Department wants to find out what the appellant's objections are and is told to wait for the expert report. Mr. Wolford felt there was a difference since the objections are not formulated prior to the appeal.

Mr. Wein and Ms. Woelfling agreed that when they were attorneys with the Department, they would have given this information up front. They agreed an appellant has a right to know the underlying basis for the Department's decision.

Judge Krancer stated that it might simply be easier to get this information in a deposition rather than trying to adopt a rule change.

Mr. Clark pointed out that in most cases an appellant has a pretty good idea of how the Department made its decision and the expert report simply puts the finishing touches on it. In a case where this information is not so readily apparent, a joint case management order could be used. Judge Krancer also added that instead of filing a motion to compel a party could ask for a case management conference.

Judge Krancer stated that he would like to eliminate the distinction between factual and expert discovery and have the same discovery deadline for both. Judge

Renwand also suggested having expert reports due prior to the end of the discovery period.

Ms. Wesdock asked why the Rules Committee had adopted a different discovery period for factual and expert discovery. Mr. Strain explained it had been at the Board's request in an effort to expedite the discovery process and was borrowed from federal practice. Judge Krancer pointed out that this type of system can work well when there is a clear distinction between what is fact and what is expert, but does not work when the distinction is murky as in Board cases.

Mr. Strain agreed that the case law that has developed around the issue of expert reports does not fit into the field of environmental law, where new facts develop and come to light over time. The theory behind expert reports is that all facts are known at that time. For example, many of the cases dealing with experts and expert reports are medical malpractice cases, which differ greatly from environmental cases.

Mr. Strain stated that the majority of Department attorneys would prefer having their experts deposed rather than file an expert report and would welcome a system where all of their witnesses are treated in the same manner, with special accommodation for paid experts. Judge Renwand pointed out that in many cases, each party agrees to pay for its own expert's expenses at a deposition.

Judge Krancer felt that eliminating the distinction between expert and non-expert discovery would resolve the problem raised by Mr. Wolford. If one side requests expert information either through interrogatories, a request for documents or deposition, the other side cannot hold off on producing it until the expert report.

Mr. Wein asked Judge Krancer how the issue of expert reports would be handled if the discovery period were made the same for both expert and non-expert information. Judge Krancer said this issue would have to be examined.

It was proposed that the Committee get input from the PBA Environmental Law Section. Ms. Wesdock will raise this issue on the Section's next conference call in October. Judges Labuskes and Renwand will also discuss it at a program they are doing for the Allegheny County Bar Association's Environmental Law Section on September 23.

Agenda for November Meeting:

The November meeting of the Rules Committee has been moved from November 11 to **November 4**, due to Veteran's Day. The agenda is as follows:

1. Possible revision of the Board's rules to eliminate the different deadlines for expert and non-expert discovery.
2. Update on rules package (Ms. Wesdock)

Committee Vacancy:

Bob Jackson advised Mr. Wein that he no longer wishes to serve on the Rules Committee. His vacancy is to be filled by the Speaker of the House. Ms. Wesdock prepared a draft letter to Speaker Perzel. The particular language of the letter was discussed and certain changes were recommended. It was also recommended that the letter elaborate on what is required of a Rules Committee member, including attending meetings six times a year in Harrisburg. It was also suggested that it be made clear that members take their obligations very seriously in reviewing and revising the Board's

rules. It might also be helpful to cite to prior meeting minutes on the Board's website. The letter will be sent out under both Judge Krancer's and Mr. Wein's signatures.

Mr. Wein will also have the government relations person at his firm follow up by contacting a staff member in Speaker Perzel's office.

Judge Labuskes asked whether it was appropriate for someone to apply for the position and was advised that it was. Mr. Wolford had previously indicated his interest to Mr. Wein. It was also suggested that this matter be placed on the agenda for the PBA Environmental Law Section's next conference call in October to determine whether any members of the environmental bar have an interest in applying or whether the Section council wished to recommend someone. Mr. Wein will participate on the call. Ms. Wesdock will contact Cheryl Terai, the Section Chair, as well as David Mandelbaum.