

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES**

Meeting of September 21, 2000

Attendance:

A meeting of the Environmental Hearing Board Rules Committee was held on September 21, 2000 beginning at approximately 12:45 p.m. The following members of the Rules Committee were in attendance: Chairman Howard Wein, Mike Bedrin, Dennis Strain, Maxine Woelfling, Tom Scott and Bob Jackson. Eugene Dice attended on behalf of Brian Clark. Representing the Environmental Hearing Board was Tom Renwand. Board Secretary Bill Phillipy also attended to answer questions regarding electronic filing.

Final Rulemaking Package:

Mary Anne Wesdock reported on the status of the final rulemaking package dealing with *pro bono* referrals, substitution of parties, and authority delegated to hearing examiners. A public meeting is scheduled for October 4, 2000 at which time the Board will vote on the final rules. Mary Anne also summarized the changes made to the rule on *pro bono* referral following receipt of IRRC's comments. Howard Wein will prepare a letter to John Carroll, attaching a copy of the July 27, 2000 minutes in which Mr. Carroll's comments were addressed by the Rules Committee.

Electronic Filing:

Mary Anne brought up a question she had been asked by a secretary at the DEP Southwest Regional Counsel's office: Should secretaries be copied on electronic filings or have some means of accessing any document that is served electronically, particularly

when an attorney is going to be out of the office for an extended period of time? Howard suggested that the registration form could contain a box that could be checked if an attorney wants his secretary to be copied on electronic filings. Bill Phillipy noted that it is the responsibility of the attorney, not the Board, to ensure that everyone is properly copied.

Dennis Strain suggested another solution was to use the automatic “out of office” reply if an attorney were going to be out of the office for an extended period of time. Howard pointed out, however, that this would not toll the time period for responding to what was filed. Dennis and Mike Bedrin also suggested use of an automatic forwarding system for e-mail. However, Howard stated that he received a considerable number of e-mails, and he would not necessarily want his secretary to have to receive all of them. In his opinion, adding a line to the registration form to allow secretaries to receive copies of electronically served documents was the closest parallel to paper filing.

Dennis Strain questioned whether this could lead to a security problem, where a secretary files something the attorney did not intend to be filed. But he further noted that the secretary would not be a registered user, but simply a recipient of the document. The person with the authority to file a document would still be the attorney. Bill Phillipy stated that, from a technical standpoint, he did not know whether a person set up to receive copies of electronic filings, but who was not a registered user, would have the capability of filing a document. He will check into this with Verilaw.

The Committee next continued discussion from the July 27 meeting about “blanket registration” versus “case-by-case registration.” The system is currently set up to require blanket registration, that is, an attorney registers to file electronically and then

opts out of those cases where he or his client does not wish to file electronically. At the last meeting, several Committee members recommended that registration be allowed on a case-by-case basis. However, following the July 27 meeting, George Miller discussed the issue with Bill Phillipy and Brett Amdur of Verilaw, who determined that case-by-case registration would likely be more of an administrative burden.

If blanket registration is to be used, Howard suggested that the notice of appearance contain a box to be checked if the attorney is opting to participate in electronic filing in the case. Bill Phillipy suggested that the box should be checked only if the attorney does not want to participate in electronic filing. Gene Dice agreed with Howard's approach. Howard also suggested that the attorney include his or her registration number on the notice of appearance if he or she is willing to participate in electronic filing.

Gene Dice raised the issue of whether documents filed electronically will be viewable by the public. All documents filed electronically will be available for viewing on the Board's website; however, there will be a lag time before they are posted. Tom Scott noted that while hard copies are available to the public, they are more difficult to access, and the notion that every electronically-filed document is out there for the world to see and possibly abuse may make some say that the benefits gained are not worth the price paid. Gene Dice pointed out that there are two competing factors: an attorney's interest in protecting his client versus an agency's interest in making documents available to the public. Bill Phillipy agreed that by making filings available on the web, the Board is providing a public service.

Tom Renwand asked about DEP's experience with posting compliance histories on its website. Mike Bedrin responded that there were complaints at first, but agreed that the agency's obligation to make public information readily available to the public competes with the interests of private parties. Tom Scott stated we may actually be moving to the next level, where information is difficult to find on the web because it contains too much information.

Tom Renwand stated that electronic filing may in some cases be more beneficial to a client, particularly where his or her attorney is in a more remote area. He explained that in one of his cases, a decision was mailed to all of the attorneys on the same day, but because two of the attorneys were in Pittsburgh and one of the attorneys was located in a more remote part of the state, the latter received his copy of the decision after the others. Prior to the attorney receiving his copy, one of the other parties had already contacted the press. If the attorneys receive copies electronically, this problem will not occur. Bill Phillipy also noted there are other advantages to the documents being posted on the web – they can be sorted by category and it allows Westlaw-Lexis type research.

The Committee next considered the proposed changes to the Board's rules necessitated by electronic filing. The proposals were set forth in a memorandum prepared by George Miller. Dennis Strain had the following suggestions: (1) The definition for "qualified attorney" should be changed to "registered attorney;" (2) The definition for "filing party" should be changed to "filing attorney;" and (3) All references to "filing party" in the body of the rules should be changed to "attorney." The Committee members were in agreement, although no formal vote was taken at this time.

Dennis asked Bill Phillipy if a broad spectrum of law firms were represented in the pilot project. Bill responded that the Board's first priority is simply to establish whether the system is functional. At this time, the Board simply focused on cases where all parties were willing to participate. The next plateau will probably eliminate the requirement that all parties must be participants. Howard felt it should be a requirement in the final rule that in order for a case to proceed electronically, all parties must agree to participate. Bill stated his concern that such a requirement could eliminate participation dramatically. Mike Bedrin also pointed out that such a rule could operate as a "veto." If a party did not want electronic filing, all he would have to do is not agree to participate and then there would be no electronic filing in the entire case.

The Committee next discussed the bifurcated service/filing aspect of the rule, that is, a party may choose to file electronically but need not accept service electronically, and vice versa. Tom Scott stated it was his opinion that if a party wants to file electronically, he should also be willing to accept service electronically; if a party is going to take advantage of electronic filing, he should also be willing to accept the disadvantages that go along with it.

Bob Jackson asked what would happen if an attorney had agreed to participate electronically but then changed his mind during the case. Howard suggested the attorney should file an amended notice of appearance stating he is opting out of electronic filing. Tom Scott suggested allowing an attorney to opt in or out of electronic filing once during a case, but not to allow an attorney to keep jumping in or out throughout the course of an appeal.

Howard asked whether the system will provide confirmation that electronically-filed documents have been received by the other parties to the case. Bill Phillipy advised that, other than one's own e-mail system saying that a document has been "sent," the filing attorney would not receive confirmation that a document has been received by the other parties. Howard noted this could be a problem if one is experiencing difficulties with the Internet. Tom Renwand said the Board is going to be lenient in such situations. Tom Scott further noted that whatever is filed electronically will not be an original filing (since notices of appeal must be filed in hard copy) and, therefore, this would not affect jurisdiction.

The Committee took an informal vote on the following question: If a party chooses to file electronically, should it also be required to receive service electronically? The following were in favor of this proposal: Howard Wein, Tom Scott, Maxine Woelfling, Gene Dice, Mike Bedrin and Bob Jackson. Dennis Strain stated he was not opposed, but did not think it was going to be an issue. Dennis pointed to proposed subsection (b) to Rule 1021.41, that states in relevant part: "When a document is filed electronically, the Board will provide a status message to all parties in the proceeding when the document is filed and *will transmit the document filed to all parties who have agreed to accept electronic service.*" (Emphasis added) Howard, however, pointed out that proposed subsection (c) to Rule 1021.32 put the obligation of service of electronically-filed documents on the attorney. Tom Scott stated he believed the responsibility for service should remain with the filing attorney.

Mike questioned whether the language pointed out by Dennis was intended to say that the Board would transmit the status message rather than the actual document. The

Committee members agreed with Mike and suggested the language be changed to the following: “When a document is filed electronically, the Board will transmit electronically a status message to all parties who have agreed to accept electronic service.” Maxine raised the issue of whether the Board’s transmission of status messages should simply be dealt with in internal operating procedures rather than in the rule itself.

Dennis questioned whether there should be some mechanism for insuring that an attorney is filing the correct document. Bill stated it would present too much of an administrative burden to have the Board’s staff verify that a document is what the attorney intended to send. Dennis suggested a feature asking the filing attorney “Is this what you intend to send?” With regard to attachments, he further suggested something similar to the procedure used by Amazon.com which shows the items one has selected. Howard agreed that Dennis’ point was well-taken since one could accidentally file the wrong document, but noted it would be a more complicated process than that done by Amazon.com or similar on-line services, which simply provide a list of the items selected. Bill proposed trying the system out first as part of the pilot project and then expanding on it as we see how it’s working.

The Committee next discussed the issue of archiving, i.e. keeping hard copies of all documents. Bill noted that if a system is going to be used as a tool, the product generated from it should stand as a final product. He explained, however, that the current archiving rules require that every document be archived in hard copy. Under the current operating system, materials that are filed electronically will be maintained that way as long as a case remains open. When a case is closed, the electronic documents will be downloaded onto a disk that will then be placed in the file. The file will remain in the

Harrisburg EHB office for approximately two years. When it is time to archive the file, everything on the disk will be printed and placed in the file in hard copy. When the archiving rules change, and Bill anticipates they will, the disk would simply be placed in the file along with any paper documents that may be part of the file.

Bob Jackson asked whether there is any possibility that electronically-stored records could be destroyed. Bill pointed out that the system is backed up, and even if a disk fails, it will still have been replicated on the system.

The Committee then discussed exhibits. The rule, as currently proposed by subsection (f) to Rule 1021.30, requires that documents exceeding 25 pages, including exhibits, must be filed in hard copy. Howard commented that while the rule currently states, “[h]ard copy of any electronically filed document which exceeds 25 pages in length (including exhibits) must also be filed with the Board in accordance with subparagraphs (a) through (c) of this rule....,” he felt it should read “...in accordance with subparagraphs (a) *and* (c) of this rule....”

The Committee discussed whether mixed filings should be permitted, i.e. some exhibits filed in hard copy, while others are filed electronically. Howard posed the following hypothetical: If a document has five exhibits, consisting of three affidavits and two expert reports, can the affidavits be filed electronically and the expert reports in hard copy? Bill stated that a mixed filing is acceptable, so long as a single exhibit is not filed partially in hard copy and partially in electronic format.

Tom Scott raised the question of whether the Board would accept exhibits filed after the motion (or response) itself is filed. In other words, when is the filing complete?

Bill surmised that exhibits filed after the motion (or response) but still within the timeframe for filing would be accepted.

The Committee examined the “affidavit problem.” In other words, may affidavits be filed electronically even though they are not signed? Bill stated that if the Electronic Transactions Act allows affidavits to be filed electronically without signature, it should not present a problem. Dennis explained that the Electronic Transactions Act is not clear on whether certain documents may be filed electronically. Howard suggested that until we understand what the Electronic Transactions Act allows, we should be conservative and require that all exhibits be filed either by fax or hard copy.

Mike noted that an attorney is still required to maintain an executed copy of what was filed, including affidavits. Bob asked whether the Board has the authority to determine what filings it will accept electronically. However, Tom Scott noted that neither the Committee nor the Board has the authority to vary the Rules of Evidence.

Dennis questioned whether the 25-page limitation should be in the rule. He noted that ten years from now, people may prefer anything over 25 pages to be filed electronically. Howard stated that if Dennis felt strongly about the page limitation, that matter should be raised with George. Dennis stated that rather than putting a page limitation in the rule, it should be a matter left to the individual judges.

Dennis stated the problem he saw with Howard’s proposal that all exhibits be filed in hard copy was that it did not make as much sense in the case of a one-page exhibit. He suggested that the question of hard copy versus electronic filing for exhibits be dealt with by order rather than by rule.

Tom Scott stated he agreed with Howard with regard to filing exhibits in hard copy. He felt it would be burdensome to allow some exhibits to be filed in hard copy, while others are filed electronically or by fax. Mike Bedrin suggested an alternative might be to specify which documents may be filed electronically. Bob Jackson proposed a rule requiring that all exhibits to a document must be filed in the same format, i.e., either all in hard copy or electronically. Bill Phillipy agreed with Bob's proposal. Howard stated that the same should be required for service of exhibits to documents. Gene Dice noted, however, that opposing counsel might prefer that certain exhibits be served electronically; however, if this were the case, counsel could reach an agreement among themselves.

Gene also noted that it might be beneficial for the judges if photographs were filed electronically and placed in sequence with a hyperlink to each photo.

With regard to the issue of mixed filing of exhibits, Tom Renwand suggested seeing how the pilot project works first.

The Committee took an informal vote on the issue of mixed filing of exhibits. The results were as follows: (1) All exhibits must be filed in hard copy – Tom Scott and Howard Wein were in favor; (2) If any exhibits must be filed in hard copy, then all must be – Tom Scott, Maxine Woelfling, and Howard Wein were in favor.

Gene Dice stated he felt filing in mixed format was fine as long as it was not unmanageable. Tom Renwand agreed. Dennis Strain and Mike Bedrin stated they did not have a problem with affidavits or photographs being filed electronically. Maxine agreed.

Bill Phillipy noted the consensus seemed to be that the 25-page limit needed further discussion and should possibly be eliminated in favor of a rule stating that if any exhibit is filed in hard copy, then all must be. Tom Renwand noted that the 25-page limit might still be necessary for documents filed in George's cases since he would not be printing them from a laser printer and this could be included in Pre-Hearing Order No. 1 in George's cases. He felt the pilot program would answer some of these questions.

Maxine suggested that some of the details might not be appropriate for a rule. She felt that while the rule should set up the basic structure for electronic filing, it need not address every detail. She emphasized the need for flexibility. Howard suggested it may be premature for a rule until we see what transpires with the pilot project. However, Bill felt that a rule was necessary in order for the Board to implement electronic filing and requested that the Committee not table the proposed rule. Maxine stated that the Committee could not address some of the issues until it sees how the program is going to work in practice. Howard agreed, stating that it is not the technology the Committee is concerned with, but how the technology fits into the legal structure. These are issues that the Rules Committee is charged with considering and answering. Tom Renwand felt that the pilot project would allow the Committee to get a read on the items that are issues and, at the present time, these issues are purely academic.

Tom Scott raised the issue of electronic discovery. This is not addressed in the proposed rules. Maxine and Tom Renwand felt this was up to the parties. Tom Renwand noted that it is an issue for the Board only when there is a discovery dispute.

Approval of Minutes:

Maxine moved to approve the minutes of the May 11, 2000 meeting. Dennis seconded. All were in favor. Bob moved to approve the minutes of the July 27, 2000 meeting. Maxine seconded. All were in favor.

Next Meeting:

The next meeting will be on **Wednesday, November 8, 2000** from **12:30 p.m.** to **4:30 p.m.** At that meeting, Howard plans to present a proposal on summary judgment practice before the Board.