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Section Chair's Column
by Michael Quinan

HAPPY NEW YEAR! Specifically, happy new bar year. On behalf of my fellow section officers and your new board of governors, let me be the first to wish you a healthy and prosperous 1996-1997.

Each year, the Administrative Law Section of the State Bar undertakes to serve not only its members, but the entire regulatory community of the Commonwealth. Our membership currently stands at 282 lawyers (not an insignificant number). Our full constituency, however, is huge. It includes the lawyers who serve the community, as well as the regulators, the industries they regulate, the customers and ratepayers of those industries and, ultimately, the public.

Last year, our chairman, Stephen Watts, initiated a membership campaign that reminded us how many lawyers practice in the administrative arena, even if they do not see themselves primarily as administrative lawyers. For instance, the corporate lawyer who incorporates a new business; the environmental lawyer who applies for a water discharge permit; the labor lawyer who file a workers compensation appeal -- all these lawyers are practicing administrative law. If we can help them see the administrative issues before them more clearly, we provide a service to both these lawyers and their clients.

If we are going to continue to provide the level of service established last year under Stephen's leadership, we are certainly going to be busy. We are already planning our major events for the year. The National Regulatory Conference, which is co-sponsored by the State Corporation Commission and the Marshall-Wythe School of Law, will be chaired this year by Eric Page. Our workshop at the Annual Meeting will be chaired by Louis Monacell. Seeing these projects in such able hands has already made my job easier. The success of these and our other activities depends finally upon the contribution of many able hands. Volunteers are always needed and always welcome. (You can contact me at 1-800-552-4529 if you want to help.)

We are also looking for new ways that we can serve the regulatory community. For example, the State Bar has recently established a home page on the Internet, and the site is being made available for use by the practice sections. *(Editor's Note: See related article on p. 5)* We have a few ideas in mind, but we would certainly like to hear yours. Please call me with any thoughts you might have on how our Section can do more for you and your clients.

ALAC Recommends More VAPA Discovery
by Patty McKenney, Esq.

In the 1996 session of the General Assembly, Delegate William Mims introduced HB 1421 which, among other things, would have authorized discovery proceedings in

administrative hearings conducted subject to section 9-6.14:12 of the Virginia Administrative Process Act. The bill was carried over, with amendments, in the Senate Committee on General Laws, and the Administrative Law Advisory Committee (ALAC), a standing committee of the Virginia Code Commission, was asked to study the matter and make recommendations for the 1997 session. ALAC formed a subcommittee to review the issue and it reported twice to the full committee this Fall. Now, ALAC has recommended to the Code Commission a modest enlarging of discovery in the administrative proceedings of but two agencies, the Department of Health Professions and the Department of Professional and Occupational Regulation.

On September 11, 1996, the discovery subcommittee first presented to ALAC a report and recommendations. After some discussion, the ALAC continued deliberation of the matter until its next meeting on October 9. In the interim, the subcommittee reconvened to discuss issues raised by the full committee. ALAC has now had its second bite of the discovery apple and is recommending certain changes to the Administrative Process Act enlarging the scope of discovery in formal (12) adjudications, but only a little.

Limited Discovery Under VAPA Currently

VAPA section 9-6.14:13 currently authorizes an agency in both formal and informal proceedings to "issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence," while requiring the issuance of such subpoenas upon the request of any party to a case. The section also provides that the agency may, for good cause shown, order depositions *de bene esse* (conditionally; provisionally; in anticipation of future need) and requests for admissions. Otherwise, the statute prohibits discovery, stating that "[n]othing in this section shall be taken to authorize discovery proceedings." HB 1421 would have made discovery in its several forms a matter of right for a party to a formal (:12) proceeding.

The Subcommittee Proposes and ALAC Disposes

After an extensive review of the matter, the subcommittee had tentatively decided that additional discovery could improve VAPA case decisions. At the same time, the subcommittee registered concern about the potential of additional discovery for abuse and delay in the hearing process. The subcommittee therefore recommended a cautious approach, proposing to enhance discovery only for proceedings in the Department of Health Professions and the Department of Professional and Occupational Regulation and calling for ALAC to monitor the changes and evaluate their impact. In DOPR, it has been customary to adjudicate a case without resort to a :12 hearing, even when the decision is one reached without the consent of the subject licensee. For this reason, the subcommittee recommended that discovery be made available not only in formal (:12) hearings, but also in informal (:11) hearings if the agency does not provide a formal hearing. This subcommittee recommendation failed to persuade a majority of the full ALAC Committee at its September meeting. Before ALAC could meet again, however, DOPR representatives announced that the agency would henceforth conform to the procedure employed by the Department of Health Professions, so that, from now on, a party may obtain a formal (:12) hearing whenever an informal (:11) hearing does not produce a consent order. This change in DOPR's way of doing business obviated for the members of ALAC any necessity for adding discovery devices to informal case adjudications.

While the subcommittee was disinclined to introduce depositions to an administrative proceeding, it did suggest adding interrogatories to VAPA and freeing requests for admissions from the present requirement for a showing of good cause. The subcommittee suggested affording both to parties to :12 proceedings as a matter of right. At its October meeting, the full ALAC voted to recommend legislation not quite so generous to parties and their counsel. ALAC's recommendation to the Code Commission is for legislation amending VAPA to permit interrogatories, but only of persons within the two affected agencies, not of witnesses or complainants, and to limit the use of this new device, even in its limited form, as requests for admissions are now limited, to where good cause is shown.

In its first report in September, the subcommittee had called for a 60-day time limit on discovery proceedings in departmental hearings, so that all discovery would need to be completed and filed with the presiding officer or the board within 60 days of the initial notice of hearing to the litigant. After the subcommittee reported again in October, ALAC was persuaded to recommend to the Code Commission something shorter, forty-five days. In September, the subcommittee had recommended that, notwithstanding any other provision of basic law of the two agencies affected, a hearing officer from the Supreme Court list as described in section 9-6.14:14.1 of the Code of Virginia be used to resolve disputes relating to the discovery issues involved in the hearing. That recommendation was not reiterated in the subcommittee's second report, so ALAC did not consider passing it on to the Code Commission. The two departments will get first crack at such conflicts.

Comparing with Other States and the Federal APA

Over half of the states include some form of discovery proceedings in their administrative process acts, although

the nature and scope varies greatly. Neither the federal Administrative Procedure Act nor the 1981 Model State Administrative Procedure Act provide for discovery. Section 556 of the federal APA allows agency employees presiding at adjudicative proceedings to issue subpoenas authorized by law and take depositions or have depositions taken "when the ends of justice would be served," much as does the current version of VAPA. Section 4-210 of the 1981 Model State APA provides that the presiding officer in a hearing, "at the request of any party shall, and upon the presiding officers own motion, may issue subpoenas, discovery orders and protective orders, in accordance with the rules of civil procedure," with such orders being enforced pursuant to the provisions of the Act with regard to civil enforcement of agency action.

The Delicate Craft of Balancing Interests

As the subcommittee noted in both its reports, enhancing discovery in administrative hearings presents the challenge of balancing fairness and the due process interests of the respondent with an agency's need to protect the public, conserve agency resources, and effectively conduct administrative hearings. In deliberating on this issue, the subcommittee held public hearings at which time it heard from both proponents and critics of legislation providing for discovery in the administrative process. There were few of either.

Proponents of greater access to discovery in administrative adjudications include lawyers who represent the regulants in the wide variety of administrative actions subject to the VAPA, including enforcement actions, permit or licensing decisions or funding decisions. One such lawyer is credited with being the inspiration for HB 1421. In the October 1994 issue of **Virginia Lawyer**, Bob Adams of McGuire, Woods, Battle & Boothe had written calling for legislation permitting greater discovery in the administrative process. He noted instances where a party's license to practice a profession and consequentially, that person's very livelihood, may be jeopardized by an agency due to allegations made by a third party. Mr. Adams noted that to prevent a party in a licensing hearing from being disadvantaged in preparing a proper defense, it is important that counsel know all the facts before the hearing begins. Although counsel for the licensee may be allowed to review some or all of the agency's file on the case prior to the hearing, Mr. Adams pointed out that there is no guarantee that the file is accurate or complete. Further, there is no obligation of the complaining third party to speak with counsel. Mr. Adams stated that "[g]iven the drastic consequences an adverse licensing action can have upon a person," including revocation of license, loss of livelihood and damage to reputation, there appears to be a need to include discovery "in the forum where the years of education, training, and reputation, which the client has invested in his career are suddenly in jeopardy."

At a public hearing and before the ALAC in October, representatives of the agencies argued to the contrary that the public would bear the burden of both extended and increased costs. There is no doubt that discovery in administrative proceedings would delay and prolong hearings. Opponents of discovery noted that such delays could prolong the potential harmful effects of a respondent's activities on the public. Critics also pointed out that VAPA is not supposed to parallel the regular court process but instead to expedite determinations in administrative hearings, and that many mechanisms presently are available to elicit information that do not prolong the administrative proceedings. Even the sponsor of HB 1421, Delegate Mims, noted that it was important to retain the expeditious nature of administrative proceedings. In a public hearing before the subcommittee, Delegate Mims had recommended that discovery proceedings be authorized for :12 hearings in the limited form of two depositions and a specific number of interrogatories and that such discovery be restricted to a limited period of time. He also commented that in order to prevent frivolous discovery in hearings, the hearing officer should have the discretion to disallow discovery requests that were excessive or burdensome.

Although agencies will be the most severely impacted, discovery in administrative proceedings also would impose additional costs on both respondents and agencies. The allowance of discovery in administrative hearings would increase the cost of litigation to the respondent, while requiring more agency resources by expanding duties for staff and increasing personnel requirements and training in order to complete agency business. The need for additional agency and staff would be felt at the Attorney General's Office as well. Courts also would face increased costs in time spent to resolve discovery disputes. The decision to exclude depositions from any legislative measure reflects the expressed concerns about costs and delays. Depositions are particularly time consuming and costly. Leaving out depositions also works to allay concerns that such discovery could have a chilling effect on complainants or witnesses. Both the recommendations floated as trial balloons by the subcommittee and the recommendations sent forward by ALAC reflect considered and good faith attempts to best balance the two sides of the scale.

Fresh From the Circuits: Fraud on the Tribunal and Vagueness

Two recent decisions from the circuit courts invite our attention. They will appear in Volume 38 of Hamilton

Bryson's **Circuit Court Opinions**. Appeals from both have been filed, so a future newsletter will surely bring news of further developments.

Out of the Circuit Court of the City of Richmond, comes *Wells Fargo Alarm Services, Inc. v. Virginia Employment Commission*, 38 Va.Cir. 382 (1996). The commission had awarded unemployment benefits to Collier, a former salesman, and Wells Fargo objected, on the ground that he had been fired for misconduct. (Wells Fargo's showing of Collier's misconduct had prompted dismissal previously by the Department of Labor and Industry of a claim by Collier to unpaid wages.) The employer was able to persuade the Employment Commission that Collier had knowingly booked a certain transaction improperly, i.e., as a lease rather than as a sale, but the VEC nevertheless ruled for the former employee because Collier showed he had been directed to do so by his branch manager. Wells Fargo then appealed to the circuit court, on the grounds that, because Collier had concealed his misconduct while employed and had perjured himself later before the VEC, the commission erred in not reopening the case to admit new evidence of other misconduct by Collier and his former supervisor. The court was not persuaded, and affirmed the VEC's decision.

In his opinion, Judge Hughes briefly reviewed the law of fraud as a basis for reopening a case and admitting new evidence. Referring to *Jones v. Willard*, 224 Va. 602, 607 (1983), Judge Hughes reminded that fraud may be intrinsic or extrinsic, and that the former includes "perjury, forged documents or other incidents of trial related to issues material to the judgment," while the latter is "conduct which prevents a fair submission of the controversy to the court." Wells Fargo accused Collier of intrinsic fraud by, among other things, failing to tell the VEC that he had lost at the Department of Labor and Industry on account of misconduct, and extrinsic fraud by concealing from Wells Fargo inculpatory documents only discovered after his discharge. Without going into detail, Judge Hughes concluded that Wells Fargo had not made out a case for intrinsic fraud, and that whether Collier committed extrinsic fraud depended on whether he was acting in cahoots with his supervisor. Judge Hughes noted that this issue had been considered at length in the VEC hearing.

Wells Fargo also argued that Collier's fraudulent concealment while employed of records proving other misconduct entitled the employer to submit new evidence under Section 60.2-622 and VR 300-01-8.3B of the *Regulations and General Rules Affecting Unemployment Compensation*. Judge Hughes noted that the commission need only accept new evidence which is material, non-cumulative, could not have been discovered by the exercise of due diligence, and is likely to change the result. Before the court, Wells Fargo admitted to a breakdown in corporate communications so that the right hand did not know what the left hand was doing in the aftermath of the internal audit which had uncovered the misconduct of Collier and his supervisor. Judge Hughes found this excuse without merit, unable to satisfy the legal standard of due diligence, and no more than confession of inadequate preparation by the employer to contest Collier's benefits before the VEC. Having based its appeal on one instance of Collier's cooking of the books, Wells Fargo could not, after VEC judgment, raise others made plain by the same company investigation.

From the Circuit Court of Loudon County, comes *Allen v. Stern*, 38 Va. Cir. 459 (1996), in which petitioner challenged a decision of the State Health Department that establishment of an outpatient surgical facility in Sterling would require a certificate of public need, and that the project must therefore undergo the review process required by Virginia's Medical Care Facilities Certificate of Public Need law, Va Code Sections 32.1-102.1 - 102.11. Before the court, Allen argued that when the statutory definition of "medical care facility" was changed in 1982 from "whether or not required to be licensed" to "whether licensed or required to be licensed," the change limited the definition and therefore the review process to only those medical facilities for which licenses were required. The Department argued to the contrary that limiting the reach of the review process in such a way had not been intended by the General Assembly, and that whether COPN review was required depended on the "functional use" of a facility rather than on licensing definitions. Debating the meaning of the statute, the parties also differed on the appropriate standard of review. Allen pointed to the criminal penalties present in the statute and argued for strict construction; the Department argued to the contrary that the statute was civil in nature, so that the court owed deference to the Department's interpretation. Sitting by designation, Judge Paul A. Sheridan of the Circuit Court of Arlington County agreed with the Department that the standard of review for interpretation of civil statutes was appropriate and then found that such a standard did not prevent a court from reaching a conclusion about the meaning of a statute or its constitutionality which differed from that of the Department.

The court then adopted petitioner's interpretation and found it too vague, both on its face and as applied, for the court to enforce. *Allen v. Stern* appears therefore to be a typical case of statutory interpretation in which a government department has had the first go at elucidating a statute assigned to it by the General Assembly for administration and enforcement. For the proposition that the court was free to read the Medical Care Facilities Certificate of Public Need statute differently than the Department of Health had read it, the court offered no Virginia case authority, and but one federal case, *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994). The question of deference to an

agency's interpretation of a statute put by the General Assembly in its particular care was addressed in *Virginia Alcoholic Beverage Control Commission v. York Street Inn, Inc.*, 220 Va. 310 (1979), and the question of whether the deference owed by a reviewing court to an agency' s interpretation is attenuated by a claim of constitutional right in jeopardy was addressed in *Turner v. Jackson*, 14 Va. App. 423 (1992), so the slate of Virginia law was not exactly clean of precedent when Allen challenged the Department of Health.

If the case law of federal administrative procedure were apt for all questions of Virginia administrative procedure, then some mention of *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) might have been appropriate, *Chevron* being perhaps the most discussed judicial decision in American administrative law in two decades or more. In *Chevron*, the Supreme Court of the United States set out the circumstances in which a reviewing court is free to interpret for itself a federal regulatory statute and to disagree with the administrative agency to which the statute it has been assigned by Congress for implementation and enforcement. Neither the Supreme Court of Virginia nor the Court of Appeals has yet endorsed *Chevron* as the standard for a court reviewing an administrative agency's interpretation of a Virginia statute. The circuit court's opinion in *Allen v. Stern* is interesting therefore not because it omits any mention *of Chevron*, but because it relies exclusively on another U.S. Supreme Court decision. For support of the proposition that he need not agree with the Health Commissioner regarding the meaning of "medical care facility," Judge Sheridan relied on *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994), a case involving Medicare reimbursement to the operator of a hospital associated with a medical school. *Thomas Jefferson University*, however, did not require a court to adopt or reject an administrative agency's interpretation of an amendment to a statute assigned for its enforcement. In that case, the court was called upon to adopt or reject an agency's interpretation of its own regulation. Thus, *Thomas Jefferson University* is not a *Chevron* sort of case at all. Moreover, the decision by the Supreme Court in that case, affirming both lower federal courts, was 6-3 in favor of the Secretary of Health and Human Services, so that it is hardly persuasive for legitimizing a court's rejection of an agency's interpretation of any sort. In its citation to *Thomas Jefferson University*, the opinion in *Allen v. Stern* does not refer to a specific page of the Supreme Court Reporter, merely to the first page on which the decision is reported, so it does not appear that what the Virginia court sought to draw from the federal case is a particular observation about judicial deference offered by the Supreme Court of the United States as generally true but inapplicable in the particular case before the Court. The specific statutory definition in dispute in *Allen v. Stern* has been substantially amended, so the substantive question is, for most of us, moot. What the court of appeals may say about the deference owed an agency's interpretation of a statute is of course of continuing interest to all of us. The appeal from the circuit court's decision in *Allen v. Stern* is docketed in the Court of Appeals as *Gordon, State Health Commissioner v. Allen.*

Attention Web Surfing Admin Lawyers! Part II

by John Paul Jones

These new sites on the World Wide Web ought to be of interest to the Internet inclined members of our section. The **State Administrative Law Committee of the ABA's Section of Administrative Law and Regulatory Practice** has joined with Florida State University's College of Law in sponsoring a new and admirably comprehensive site offering information on state administrative law. Its creator and custodian, Professor Jim Rossi, has done an excellent job. Its address is

http://law.fsu.edu/library/adminpro.html

The California law firm of **Eslamboly & Barlavi** has sponsored a useful site for legal research on the World Wide Web. Resources are divided by government branch: executive, legislative, and judicial, as well as by subject matter, albeit less than comprehensively. The site offers specific research tools and addresses for disability discrimination and workers' compensation. Bahman Eslamboly did a nice job designing the site. Its address is:

http://www.lawguru.com/lawlinks.html

The **Richmond Journal of Law & Technology** publishes exclusively on the Internet. Its current issue includes an article, *Self Incrimination and Cryptographic Keys* by Professor Greg S. Sergienko, a review by Jeffrey A. Wolfson of the book **Federal Broadband Law** by Thorne, Huber & Kellog, and a student piece provocatively titled: *Accidents on the Information Superhighway: On-line Liability and Regulation.* The Journal's address is:

http://www.urich.edu:80/~jolt.html

Last but not least, there is our Virginia State Bar's new home page. It is hospitable, dignified, and easy to navigate. It is a class act and Brad Sheppard put it together. The address is:

http://www.vsb.org/index.html

Pour Encourager Les Autres

Voltaire once said, "In this country it is good to kill an admiral from time to time, to encourage the others." That sentiment seems to have inspired recently the Court of Appeals. In *Uninsured Employers' Fund v. Coyle*, 22 Va. App. 157 (1996), the court dismissed an appeal after appellant failed to deliver an opening brief on time and filed for an extension of time only after the deadline for submission had passed. The short, blunt opinion of the court is presented verbatim:

The record in this matter was filed with this Court on July 20, 1995. Pursuant to Rule 5A:19(b)(1), the opening brief was due on August 29, 1995. Appellant did not file an opening brief by that date, nor did it file a motion for an extension of time to file the opening brief. Rather, on September 5, 1995, appellant moved to extend the time to file the opening brief and also submitted its opening brief on that date. Appellee Todd E. Coyle has moved to dismiss the appeal on the basis that the opening brief was not timely filed.

Rule 5A:19(b)(1) reads: "The appellant shall file the opening brief in the office of the clerk of the Court of Appeals within 40 days after the date of the filing of the record in such office." (Emphasis added.) The word "shall" is generally used in an imperative or mandatory sense. See *Mayo v. Commonwealth*, 4 Va. App. 520, 523, (1987). We find nothing in the rule to indicate that we should interpret the word otherwise.[1] Consequently, in order for an opening brief to be timely, it must, within forty days after the filing of the record, (1) be delivered to the clerk of this Court, or (2) be mailed in accordance with Rule 5A:3(c).

Furthermore, while Rule 5A:3(b) allows an appellant to move to extend the time for filing an opening brief, this rule must be read in conjunction with other relevant provisions of the rules. We hold that an appellant may move to extend the time to file an opening brief, but our authority to address the motion cannot extend beyond the authority granted to us to process the opening brief itself. Accordingly, a motion to extend the time to file an opening brief must, within forty days after the filing of the record, (1) be delivered to the clerk of this Court, or (2) be mailed in accordance with Rule 5A:3(c).

Under Rule 5A:19(b)(1), an opening brief must be timely filed; yet, that rule fails to provide a sanction for noncompliance. To determine the appropriate sanction, we look to Rule 5A:26, which reads: "If neither party has filed a brief in compliance with these Rules, the Court of Appeals may dismiss the appeal. If one party has but the other has not filed such a brief, the party in default will not be heard orally, except for good cause shown." If an appellant has failed to meet the mandatory filing requirement for an opening brief, then, at that point in time, "neither party has filed a brief in compliance with these Rules." In such a case, Rule 5A:26 permits us to dismiss the appeal.

Applying this reasoning to the facts of this case, we conclude that the appeal should be dismissed. Appellant was obligated to file the opening brief, or a motion to extend the time for filing, by August 29, 1995.[2] It failed to do so. Accordingly, we hold that (1) the motion to extend the time for filing the opening brief was not timely filed and is denied; (2) the opening brief was not filed in compliance with Rule 5A:19(b)(1); and (3) the appeal is dismissed.

Because this issue occurs with sufficient regularity that members of the bar may benefit from the directives herein, the Clerk is directed to publish this order. (emphasis added)

1. In so holding, we recognize that the opening brief is not listed in Rule 5A:3(a) as one of the documents that carries a mandatory filing date. However, we interpret the term "mandatory," as used in that rule, to mean that this Court, absent authority granted elsewhere by statute or rule, has no power to extend the time for filing these documents. In this light, therefore, our use of the term "mandatory" as it relates to opening briefs differs from the use of the term in Rule 5A:3(a).

2. Extensions of time for filing will only be granted for good cause. An appellant who does not obtain an order extending the time for filing within the forty day period delays at its own peril a determination by the Court that good cause does not exist to extend the time for filing.

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