The benefits of membership in the Pennsylvania Bar Association are varied and include not only tremendous legal resources, but also the opportunity to network with other members of the Bar outside the government sector. The benefit of networking provided by membership in the PBA is the opportunity for practitioners in one part of the state to meet and befriend practitioners from other regions of the state and other areas of practice. Because of the richness of opportunities that are afforded by PBA membership, we would encourage all of the members of the Government Lawyers Committee to become more involved in the PBA and to consider pursuing leadership positions. Leadership positions provide even more opportunities for networking and for expanding one’s horizons — both professionally and personally.

While the classic benefits of the PBA are well known to many, there are also a myriad of services available. The classic benefits include access to committees and sections related to various practice areas, continuing legal education opportunities and numerous publications on areas of interest to members of the Bar and of this committee. In addition, the PBA provides services that are not only helpful, but that can also result in significant savings for members. For example, the PBA offers discounts for three major car rental companies, access to a no-fee credit card and insurance programs that offer insurance products at reduced rates for PBA members.

There is also a magazine subscription service that provides savings on subscription orders, a discount program with a men’s clothing retailer and a list of financial benefits with a banking institution.

So, as you look toward planning your summer vacation, you can save money on your vacation car rental, buy men’s clothes for the trip at a savings, pay for your trip with a credit card, buy magazines to read when you get to your destination and feel secure in the knowledge that your homeowners and life insurance policies are in place.

The benefits of membership in the PBA include membership in an outstanding statewide organization, the opportunity for meeting many new and interesting folks in the legal profession from all over the state and other useful services as well.

We wish you all the very best for a wonderful summer.

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In the last edition, we gave you tips on how to use Microsoft Outlook to block unwanted e-mail. It has since come to our attention that our tip may be working too well. Not only are government lawyers blocking junk e-mails but it seems they may be inadvertently blocking legitimate e-mails as well. The problem arises when a user accidentally tags e-mail from a wanted sender as junk mail. This automatically sends all future e-mails from that sender into the junk e-mail folder. Once classified as a junk mail sender, the sender’s e-mails are removed from the recipient’s inbox without the recipient’s knowledge.

Should you find yourself in this predicament, simply follow these few easy steps:
2. Select “Junk Mail.”
3. Under “More Options,” select “Click Here.”

You can now scroll through the list to see if you have inadvertently tagged a legitimate sender’s e-mail address as a junk sender. If you have, simply highlight the appropriate name and select “Delete.” These sender’s e-mails will again start appearing in your inbox.

For those of you who might have missed our tips on blocking unwanted e-mails, please see Page 4 of the Winter edition, available on the PBA Web site at www.pabar.org.

Other features appearing in the summer edition include a profile of Attorney General Jerry Pappert and Erie County District Attorney Brad Foulk. In addition, you can learn more about discovery in administrative proceedings and on a colleague’s trip to China as one of five Americans chosen to take part in an historic trip to help draft China’s first set of laws on charity oversight. These are just a few of the articles appearing in this edition. We hope you enjoy them.

Have a great summer.
Subcommittee Reports

What’s Going On:

Services to Members

The Services to Members Subcommittee has been working hard to finalize its latest project: an expanded directory of Pennsylvania governmental legal offices and the full-time attorneys who work in them. Co-chairs Jerry Mackarevich and Bob Shea report that the subcommittee is planning to go to press in late summer with the second edition of the Pennsylvania Government Lawyers Directory. The first edition was well-received when it was published in 1999-2000. The subcommittee has made the second edition even better by increasing the number of listings, particularly from the local level.

Career Enhancement

On April 20, the Career Enhancement Subcommittee presented a “Lunch and Learn” at the Dauphin County Bar Association featuring Secretary of the Commonwealth Pedro A. Cortés. Cortés discussed his career and inspired the audience to get the most out of their careers. Special thanks to Michael Shatto of the PBA, and the Dauphin County Bar Association for making this event possible.

The subcommittee also held presentations earlier this year for law students at Widener, Dickinson and Duquesne. Each presentation featured a panel of government lawyers discussing the rewards of government practice. The presentations were well received by all in attendance. Special thanks to the following individuals for coordinating the law school presentations: Tracy McCurdy (subcommittee co-chair) of the Department of State; Christopher Carusone (subcommittee co-chair) of the Office of Attorney General and John Henderson of the Department of State.

Virtual Law Clinic Effort Now Underway by Governor’s Office of General Counsel Attorneys

Initially the attorneys will work through MidPenn with the less fortunate in Dauphin and Perry Counties. A person is eligible for help through the law clinic if the person qualifies for legal services but cannot receive them from MidPenn due to its limited resources. In those cases, MidPenn Legal Services will put an OGC attorney in contact with the persons in need. The OGC lawyers will then make use of contacts and Internet resources to solve problems and help extend the access to justice to the MidPenn clientele. The Virtual Law Clinic is just one more way OGC attorneys are working to provide pro bono services to the needy.

Keglers Strike it Big

(left to right) Team members pictured are Jackie Borda, Patti Doyle, Brenda Morris, Brooke Weaver, Patrick Bair, Judy Rivera, Suzanne Snelbaker, Jeanette Hulse and Lovenia Nickle. Team members not pictured are Marty Siegel, Alex Siegel, Beryl Kuhr, Marti Kuhr-Bair, Zach Martick, Evelia Rivera and Josh Doyle.

On Saturday, April 17, keglers from the Department of Environmental Protection’s Office of Chief Counsel participated for a third year in the annual Big Brothers/Big Sisters Bowling for Kids’ Sake charity event. The team, which was comprised of 20 attorneys, support staff and their families, raised more than $1,450 in donations and pledges for the Capital Region “Bigs.” Everyone had a great time and the team was awed by Jackie Borda’s 258 game. Thanks to all of the bowlers and their sponsors, who are looking forward to even “Bigger” things next year!
Karl Emerson Selected for Historic China Trip

By MaryAnne Wesdock, Senior Assistant Counsel, Environmental Hearing Board

Ni hao – That’s Chinese for “hello.” And it’s just one of the Chinese expressions with which Karl Emerson has recently become familiar. Emerson, director of Pennsylvania’s Bureau of Charitable Organizations, was one of five Americans chosen to take part in a historic trip to China in December 2003, to help those drafting China’s first set of laws on charity oversight. While there, he met with Chinese government officials, law professors and others, with the goal of establishing effective oversight for China’s growing charitable sector.

“Most people don’t realize how rapidly China is moving to a free market economy. And while millions have benefited from this transition, many have fallen into poverty as inefficient state-run businesses have been closed,” stated Emerson. “As a result, the Chinese government is much more receptive to allowing both domestic and foreign charities to help meet the very real needs of its people.”

Emerson was told that the legislation being drafted in China will require that at least 70 percent of the donations made to a charity be spent on its charitable purposes, as opposed to its administrative or fundraising costs. In contrast, in the United States no such restriction may be imposed, pursuant to a series of U.S. Supreme Court cases that were recently reaffirmed in Madigan v. Telemarketing Associates, Inc. In addition to meeting with government officials responsible for drafting the new oversight legislation, Emerson gave the keynote address – in English – at a three-day training conference on accountability for Chinese leaders of nonprofits. And in order to get his message across to an even broader audience, his speech is being translated into Chinese and placed on the Web site of the China Non-Profit Organization Network.

Emerson was selected by the Maclellan Foundation, which underwrote the trip, because of his expertise in the field of charity regulation at both the state and federal levels. He is a former president of the National Association of State Charity Officials, and for the last three years has been a member of the IRS’s Tax-Exempt Advisory Committee. A former prosecutor with the Bureau of Professional and Occupational Affairs and senior deputy inspector general in the Office of Inspector General, Emerson has headed the Department of State’s Bureau of Charitable Organizations since the fall of 1995. His bureau is responsible for enforcing Pennsylvania’s Solicitation of Funds for Charitable Purposes Act. It also maintains registration and financial information on more than 7,700 charities soliciting in the commonwealth, as well as more than 350 professional solicitors and fundraising counselors.

It was his experience as a former prosecuting attorney that led to his appointment as director of the bureau. In May of 1995, an organization calling itself the Foundation for New Era Philanthropy registered to solicit charitable funds in Pennsylvania. It was subsequently discovered to be a fraudulent charity that had been running the largest Ponzi, or pyramid, scheme in U.S. history. This case led to the decision to have the Bureau of Charitable Organizations headed by a prosecuting attorney who had experience investigating fraud cases. Emerson was appointed to that role and his first duty was to set up a special investigation and audit unit. Previously, the bureau was simply a filing office; it now houses an investigation and audit unit complete with five investigators, four auditors and a full-time prosecuting attorney. In addition, as a result of Emerson’s initiative, Pennsylvania recently became the first state to allow both charities and fundraising counsels to register electronically. Information regarding how much a charity spends on its charitable purpose, administration and fundraising are all easily available from the bureau’s Web site at www.dos.state.pa.us.

Emerson is no stranger to receiving accolades for his work. In 2003, along with Bill Gates, New York Attorney General Elliot Spitzer and notable others, he was named to The Non-Profit Times “Power and Influence Top 50” list. Emerson was called “an aggressive prosecutor who also thoughtfully considers the impact of his actions. Attorneys general from around the country look to Emerson’s lead and nonprofit managers, the smart ones, hang on his every word.” Emerson jokes it will probably be the only time in his life that his name appears on any list with Bill Gates.

In 2001, Emerson was named Government Philanthropic Partner of the Year by the Greater Philadelphia Chapter of the Association of Fundraising Professionals. Only one person prior to him had received this honor. In fact, when he received the telephone call informing him he had been selected for the (Continued on Page 5)
Karl Emerson Selected for Historic China Trip

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award, he admitted he had never heard of it and asked the caller if it was real. He was advised that it was, to which Emerson somewhat dubiously asked, “Who else has received it?” The caller responded, “Ed Rendell, have you ever heard of him?”

Ironically, it was this very group that years earlier had set into motion a series of events that ultimately led to Emerson’s trip to China. In the fall of 1995, he took a call from a woman seeking resolution to a problem. She subsequently asked him to speak to the Philadelphia Chapter of the National Society of Fundraising Executives (the forerunner of the group mentioned earlier). Despite an ominous warning from a colleague to not do so, Emerson went ahead with the speech, which turned out to be a wonderful experience. As a result of this initial speech, Emerson has since been asked to give more than 85 other speeches and presentations throughout Pennsylvania and around the country. It was during one of those many speaking engagements that a representative of the Macellan Foundation heard him and asked him to be a part of the group working to help China develop its charity oversight laws.

It was also his speaking ability that led to more adventure in China. Following a press conference after his keynote address at the accountability training conference in Beijing, the editor of The China Philanthropy Times offered to take Emerson on a tour of such notable landmarks as the Great Wall, the Ming Tombs and the Forbidden City.

Emerson describes his experience in China as “the trip of a lifetime” and notes that all of the people he met “were incredibly kind and gracious.” Will he return? Possibly. Not to be outdone by their rival city, Beijing, conference attendees from China’s largest city, Shanghai, told Emerson they plan to invite him to speak at their conference in Shanghai. Whether that comes to fruition remains to be seen. However, one thing remains certain: Emerson both enjoys and is dedicated to the work that he does for both the Commonwealth of Pennsylvania and abroad – after his grueling 17-hour return flight from China, he was at his desk busy at work the very next day. He is indeed an inspiration to all those in public service.

“The Greatest Experience of My Life”

By Carol Mowery, Assistant Counsel, Department of Labor and Industry

Philadelphia Assistant District Attorney Jerry Teresinski describes his recent active duty assignment with the U.S. Army in the war in Iraq as both challenging and rewarding. Jerry is a reservist and a member of the Judge Advocate General Corps assigned to the 153rd Legal Support Organization in Norristown. Teresinski was deployed on Feb. 10, 2003, and was assigned to the U.S. Central Command, Staff Judge Advocate’s Office in Kuwait. His primary mission was as chief officer in charge of the Mosul Office of Judicial Operations, Staff Judge Advocate’s Office, 101st Airborne Division (Air Assault) in Northern Iraq. He was awarded the Bronze Star for his efforts.

As chief officer in charge of the Mosul Office of Judicial Operations (affectionately referred to as “MOJO”), Teresinski headed a staff of soldiers whose goal was to get the Iraqi courts back up and running and to ensure that proper laws were being followed. Mosul is the third largest city in Iraq and has approximately 3,000 lawyers, many of whom were unemployed before the war. All of the self-interested laws created by Sadaam Hussein have been abolished and the Iraqi lawyers were trained to follow the Iraqi Criminal Code of 1969 and the Iraqi Criminal Procedure Code of 1971, which were in place prior to Sadaam’s rule. Because many of the courts have been looted in the war, necessary equipment had to be restored to make the courts operational. Then, the Coalition Provisional Authority enacted Miranda-type rights designed to bring Iraq in line with international human rights laws. Iraqi lawyers, executors, judges, police officers and citizens were trained in these new rights. Teresinski and his staff also created the Court Appointed Attorney Program designed to provide indigent defendants with legal representation in the early stages of criminal proceedings — similar to the American preliminary hearing system. Many of the Iraqi lawyers worked on a volunteer basis until the program became fully functional.

Teresinski stated that the Iraqi people expressed immense gratitude for the liberation from 35 years of corruption created at the hands of a dictator. While acknowledging the daunting task that lies ahead in the reformation effort, Teresinski spoke with great pride and satisfaction about his mission with the 101st Airborne Division and the progress that has been made in Iraq’s judicial system as a result. He earnestly stated, “It was the greatest experience of my life.”
Discovery in the Context of Administrative Hearings

By Karen M. Balaban, Esq., of Balaban LLC, Harrisburg

The breadth of discovery offered by the rules of civil procedure is not generally available in the administrative law forum. To litigators who have mastered pre-trial preparation under the Pennsylvania and Federal Rules of Civil Procedure, this is a source of great frustration.

There is no judicial or legislative mandate for broad discovery in administrative proceedings. “In the absence of such a right, the fact that some adequate form of discovery was allowed is sufficient to show that no violation of due process rights occurred.” Eastern Pennsylvania Psychiatric Institute, Department of Public Welfare v. Russell, 465 A.2d 1313 (Pa. Cmwlth. 1983). The Administrative Agency Law, 2 Pa.C.S. § 501 et seq., does not address discovery. Guidance is provided by the General Rules of Administrative Procedure (GRAPP) to practitioners before state government agencies. The paltry opportunities for discovery under GRAPP are limited to prehearing conferences (1 Pa. Code §§ 35.111-116), subpoenas (1 Pa. Code § 35.142), depositions (1 Pa. Code § 35.145 and 35.150) and prepared expert testimony (1 Pa. Code § 35.166). A primer of these GRAPP discovery rules follows.

Prehearing Conference

A prehearing conference may be used to obtain information. Section 35.112 addresses the possible consideration of exchanging exhibits to be offered as evidence, obtaining admissions or stipulations, and the discovery or production of data. Whether such actions occur is at the discretion of the agency head or presiding officer conducting the prehearing conference. However, a prehearing conference must be requested by a party. A prehearing conference is not mandated. Therefore, to utilize the discovery opportunity it presents, a motion requesting the conference under Section 35.113 should be filed.

Sanctions are provided for non-compliance by a party under Section 35.116. If a party refuses to admit or stipulate to the authenticity of a document or the truth of a matter of fact and the party requesting the admission or stipulation later proves the authenticity or truth, that party may apply for reimbursement of the expenses incurred in proving it. Of course, the Catch-22 for many parties would be that they are unable to find proof without the cooperation of the other party.

Subpoena

Under Section 35.142(a), a party may apply to an agency head or presiding officer for issuance of subpoenas. The written applications must specify the general relevance, materiality and scope of the testimony and documentary evidence sought. The agency head or presiding officer will then determine whether or not to issue a subpoena based on the relevance and materiality of the evidence sought. This section applies to both subpoenas for attendance of witnesses and production of documents. The Commonwealth Court remanded a case for a new hearing where the Insurance Department conducted a hearing after failing to issue a subpoena requested by a consumer in accordance with the regulation. Weinberg v. Insurance Department, 398 A.2d 1120 (Pa. Cmwlth. 1979).

Depositions

Depositions are permitted upon application to the agency head or presiding officer. They are limited to the presentation of the testimony of a witness. The scope of the deposition, unless limited in the authorization, may include “the existence, description, nature, custody, condition and location of a book, document or other tangible thing, and the identity and location of persons having knowledge of relevant facts.” See 1 Pa. Code §§ 35.145-35.152.

Prepared Expert Testimony

A participant must be provided with a copy of an expert’s prepared written testimony or exhibit at least 20 days prior to the hearing at which such testimony or exhibit is to be authenticated and subjected to cross examination. See 1 Pa. Code § 35.166.

Agency-Specific Rules of Discovery

Knowledge of the GRAPP rules for discovery is merely a starting point. A participant must be aware of the administrative rules of practice specific to a particular agency. Where agency-specific discovery rules exist, they generally provide for a broader form of discovery than GRAPP. Such rules may either supplement or pre-empt GRAPP’s discovery procedures. The following is an extensive, but not exhaustive, listing of administrative agencies with specific discovery rules.

- Banking 10 Pa. Code § 3.10 (prehearing conference).
- Insurance Department 31 Pa. Code § 56.3 (admissions as to facts and documents).
- Local Government Unit Debt Act (Department of Community and Economic Development) 12 Pa. Code § 11.14(b)(6) provides that the presiding officer has the power and authority, “subject to this chapter and the act,” to take or cause depositions or other discovery to be taken.
- Liquor Control Board 40 Pa. Code § 15.43 (prehearing conference), § 17.5 (subpoena), § 17.6 (depositions and discovery).
- Workers Compensation 34 Pa. Code § 131.61 (exchange of information), § 131.62 (oral depositions), § 131.68 (discovery).

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Discovery in the Context of Administrative Hearings

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ery of records), § 131.69 (form of deposition affidavit), § 131.70 (discovery of statements of parties or witnesses), § 131.81 (subpoenas).

Right-to-Know Law 65 P.S. §§ 66.1-66.9

This act provides a creative approach to discovery that may not otherwise be authorized under GRAPP or other agency-specific administrative rules. It provides Pennsylvania citizens the right to examine public records of public agencies. A public record is an account, voucher, contract, and any minute, order or decision affecting personal or property rights, duties or obligations of any person or group (65 P.S. § 66.1). The Supreme Court has stated that the Right-to-Know Law can reach records that do not, on their face, fit into one of the above categories if the party seeking access establishes a close connection between one of the statutory categories and the material sought. LaValle v. Office of General Counsel, 769 A.2d 449 (Pa. 2001).

The following are not public records:

• Materials that show pre-decisional internal deliberative aspects of an agency decision. LaValle.
• Work product. LaValle.
• Raw data, models, projections, studies, surveys, analysis: the court found these items were not public records because they were not a basis or condition precedent of a decision. S.A.V.E. Inc. v. Delaware Valley Regional Planning Commission, 819 A.2d 1235 (Pa. Cmwlth. 2003).

There are statutory exceptions to the requirement to disclose public records (65 P.S. § 66.1). These include:

• Reports or communications disclosing the progress or results of official investigations. The burden is on the agency to prove the records would reveal the progress or result of the investigation. This exception is not limited to active investigations. Commonwealth v. Mines, 680 A.2d 1227 (Pa. Cmwlth. 1996).
• Documents for which public access is protected by law or court order.
• Documents that would impair a person’s personal security.
• Documents for which disclosure would result in the loss of federal funds.
• Documents that would prejudice or impair personal reputation.

Worth Reading:

Behers v. Unemployment Compensation Bd. of Review
842 A.2d 359 (Pa. 2004)

By Judith Gilroy, Assistant Counsel, Department of Labor & Industry

In Behers v. Unemployment Compensation Board of Review, the Pennsylvania Supreme Court was asked to determine “whether the Commonwealth Court was correct in looking beyond the terms of a collective bargaining agreement (CBA) to determine what conduct constitutes a disruption of status quo in an unemployment compensation case.” Specifically, the court was asked to decide whether the CBA’s terms and conditions include the past practices of the parties as well as the explicit terms of the agreement.

The employer in this case was St. Paul’s Manor, a personal care home for the elderly. Local 23 of the United Food and Commercial Workers of America represented the employees. The parties were working under terms of an expired collective bargaining agreement.

There were three pertinent sections of the agreement. The first section stated that employees who suffered a work-related injury were eligible for light-duty assignments within the physician’s restrictions. The second section stated that the employer had the right to assign shifts. The third section stated that employees had the right to shift preference in accordance with their seniority. The past practice of the parties was that employees on light-duty were permitted to maintain their regular shift hours.

However, during the time that the expired agreement was in force, the employer instituted a new policy requiring light-duty employees to choose between one of only two shifts — day and evening. Two employees in the same job category who worked daylight hours went on light-duty. The employer offered the daylight hours to the more senior employee.

On May 11, 1998, approximately three weeks afterward, contract negotiations broke down and the union began a work stoppage. Twenty-one employees sought unemployment compensation benefits, contending that the employer had changed the status quo and constructively locked them out.

The unemployment compensation referee determined that the work stoppage was a strike rather than a work stoppage and denied benefits. The Unemployment Compensation Board of Review affirmed the decision without opinion. However, the Commonwealth Court reversed, holding that the employer had changed its past practice and had thus disrupted the status quo. The court interpreted the status quo as including both the written terms of the CBA and the past practices of the parties. The employer appealed.

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Attorney General
By Linda Williams, Chief Deputy Attorney General, Office of Attorney General

Those who worked in the Office of Attorney General in November of 1996, knew a great deal about Mike Fisher, the newly-elected attorney general of the commonwealth. He had been in public service for many years and, during the transition period, each of us had the opportunity to meet with the attorney general-elect and tell him about our work.

We knew very little, however, about his choice for first deputy attorney general, Jerry Pappert. The advance “press” that spread like wildfire through the office grapevine was tantalizing: “He is so-ooooo young.” It was some weeks after Fisher’s swearing-in in January 1997, before I had the opportunity to meet the first deputy. It was one of those rare occasions when reality exceeds expectation. What I could not have known when I first met Pappert, however, was that his intellect, integrity and tireless dedication to this office and to public service far surpassed his youth, and would be the hallmarks of Fisher’s tenure.

Pappert quickly learned our names and proved accessible to all of us: his professionalism was touched by a warmth and compassion that made him a favorite among all who met him. For those who knew and worked with him, there could have been no more unanimous choice than Pappert to serve out Fisher’s term as attorney general (when Fisher was sworn in as a federal judge). I always wondered, though, through what confluence of nature and circumstance, this public servant had come to be our leader.

Pappert was born and raised in Albany, N.Y. His father was in sales and his mother was a teacher. Interestingly, he had no family members who were lawyers or connected to the legal profession, but he decided that he wanted to pursue a legal career. He attended Villanova University and earned a double major in the political science and honors programs. When he graduated with honors in 1985, he decided to attend law school at Notre Dame, where he graduated in 1988.

He interviewed with firms in Philadelphia, upstate New York, Chicago and Boston, but thought that Philadelphia would be a good choice because, during the time he had been at Villanova, he had grown to love Philadelphia and its suburbs. Philadelphia was a big city with many things to do, and was close enough for him to visit his family in Albany. Ultimately, he took a position with Duane, Morris and Heckscher, now Duane Morris, LLP. He learned about Philadelphia’s many distinctive neighborhoods, living in center city near Rittenhouse Square, the Fairmount section and the Lafayette Hill/Chestnut Hill area.

At Duane Morris, he started in the trial department, doing business-related commercial litigation in state and federal courts. He handled employment law cases, including those with covenants not to compete, which he found extremely interesting.

He first got involved in politics when he met Herb Linsenberg, who was the Republican candidate for comptroller in Philadelphia. His first exposure to the political process was when he did some work for Linsenberg in the context of his campaign. However, his first formal political campaign was when he became involved in Sen. Rick Santorum’s 1994 campaign for the U.S. Senate. He took a leave of absence from Duane Morris to work full time for Santorum’s campaign manager, Pat Meehan (now the United States attorney for the Eastern District, Pennsylvania). While working on Santorum’s campaign, Pappert learned a great deal about how a statewide campaign operates. After Santorum was successfully elected, Pappert returned to Duane Morris.

In the beginning of 1996, Sen. Mike Fisher was looking for someone to manage his statewide campaign for attorney general. A number of people in the Santorum campaign recommended Pappert for the position. He received a call and met with some of Fisher’s staff, who recommended him to the candidate. When he and Fisher met in Philadelphia, they hit it off immediately, and Fisher offered him the position. Pappert took another leave from Duane Morris to work on the campaign and orchestrated Fisher’s successful first run for attorney general.

After the election, Pappert was appointed first deputy attorney general, a position responsible for oversight of all personnel, administrative and legal aspects of the office. He found that the most unexpected part of the job was the amount of time required to attend to administrative duties and to address personnel issues. Pappert was also surprised by the significant time that was spent on substantive legal areas outside of the criminal law division. He found this to be a far greater part of the job than anyone outside of the office would ever imagine.

His goal was to provide continuity and stability so that staff members could concentrate on doing their jobs ... [and] ... to demonstrate by example the professionalism and integrity needed to serve the public well.

When Pappert arrived as first deputy attorney general, the office had been through a very difficult period. A number of attorneys general had been in the office for short periods of time. His goal was to provide continuity and stability so that staff members could concentrate on doing their jobs. A large part of accomplishing that goal was to demonstrate by example the professionalism and integrity needed to serve the public well.

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Close Up

Setting the Bar High for Public Service:
A Profile of Attorney General Jerry Pappert
(Continued from Page 8)

people the professionalism and integrity needed to serve the public well. He attributes the tenor and tone of the office that exists today to Fisher, who he says was a role model for great leadership. He measures their success in part by the low turnover experienced during his and Fisher’s tenure in office. He points proudly to the fact that the majority of the regional directors are the same and that there has been very little turnover among the senior staff.

During his tenure as first deputy, Pappert had many tremendous opportunities to be involved in matters of significant impact. He said one of the greatest honors that a lawyer can have is the opportunity to argue a case before the U.S. Supreme Court. He considers the case he argued before the U.S. Supreme Court as the highlight of his career and a very important case for the attorney general and for the commonwealth of Pennsylvania. The case of Timothy Booth v. C. O. Churner, et al., was filed in May 1997, by a Pennsylvania prison inmate against four corrections officials at the State Correctional Institution at Smithfield, Huntingdon County. This case involved the 1996 Federal Prison Litigation Reform Act (PLRA). Congress passed the PLRA because, in 1995, prisoners had filed more than 40,000 federal lawsuits, most of which were deemed to be without merit. Pappert argued that the PLRA requires the exhaustion of administrative remedies in order to lessen the burden on the courts in sifting through inmate complaints, which would allow the courts to focus on the issues that are ultimately litigated. The U.S. Supreme Court agreed with Pappert’s argument, which established the precedent on behalf of state prison officials.

Pappert is also extremely proud of representing the commonwealth in the Milton Hershey School matter in which he argued successfully to prevent the sale of Hershey Foods by the Hershey Trust Company, trustee of the Milton Hershey School Trust. In this case, the attorney general filed an action in the Orphan’s Court of Dauphin County to enjoin the sale. Pappert successfully argued, both in the Dauphin County Orphan’s Court and on appeal to the Commonwealth Court, that such a sale would result in irreparable harm to the Milton Hershey School Trust, its charitable mission, the Hershey community and the public interest. As a result, the sale did not go through. He said that the result in that case was extremely gratifying for him both as a lawyer and as a resident of central Pennsylvania.

Another matter that he found very satisfying was successfully defending a challenge to the constitutionality of changes to the composition and procedures of the State Board of Pardons, a board upon which he now sits as attorney general. This constitutional amendment had passed two consecutive sessions of the General Assembly and was approved by nearly 60 percent of voters in the November 1997 general election. In this case, he argued in support of this amendment, which revamped the Pardons Board procedures and mandated a unanimous board decision for recommendations to commute a sentence of death or life imprisonment.

When Pappert first got involved in the Fisher campaign and was then appointed as the first deputy, he did not anticipate becoming the attorney general. He first realized this might become a possibility when Fisher was nominated by President Bush to the federal bench. He thought though, if given the opportunity, he would be well-prepared for the challenge, having spent seven years as the first deputy, and would be honored to serve.

... [C]riminal justice, health care and consumer protection ... success in addressing those issues results in positive good for the citizens of the commonwealth.

Since December, Pappert has focused on fulfilling the duties of his new position, which include extensive travel throughout the state. He believes the attorney general can make a difference in the lives of Pennsylvanians, which is tremendously satisfying. He has noted the profound importance of issues involving criminal justice, health care and consumer protection, and believes that success in addressing those issues results in positive good for the citizens of the commonwealth.

In his travels as attorney general, Pappert meets with people from many different areas and learns about the diverse regions of Pennsylvania and those who live here. Since Pennsylvania is so large and varied, he finds this opportunity to be particularly rewarding. His primary focus now is to fulfill his responsibility as attorney general and accomplish as much as possible before the end of his tenure in January 2005. Among the initiatives he is pursuing are the cost and illegal diversion of prescription drugs.

Pappert has followed in the footsteps of outstanding public servants who have set the bar high for government service. For those of us who have had the unique privilege to serve under Pappert, we believe he has met this high standard. These last months of his tenure will be bittersweet, as he has been a constant in our lives for over seven years and, by his example, has inspired us to be better attorneys and better public servants.

Worth Reading:
(Continued from Page 7)

In determining the case, the Pennsylvania Supreme Court affirmed its holding in Miceli v. Unemployment Compensation Board of Review (Quaker Oats Co.), 549 A.2d 113 (Pa. 1988). The court found that “a court may not look beyond the terms and conditions of employment, as embodied in the CBA, in order to [determine whether the status quo has been disrupted].” The status quo consists of the terms and conditions embodied in the expired agreement and not past practices beyond those terms. Because the expired agreement gave management the right to make shift assignments, the court held that the employer did not disrupt the status quo by exercising that right.
For Bradley H. Foulk, Erie County district attorney, practicing law seems to be more of a passion than a career. "I have the best job in the world, even on the bad days," Foulk states. The enthusiasm he brings to his role proves that he means what he says. Foulk, who took office in January 2000, and is now in his second term as the top law enforcement officer in Erie County, not only upholds the law, but also immerses himself in projects to better the legal profession, the community he serves, child victims and even certain inmates.

Foulk’s practice of criminal law goes back more than 25 years. After a brief period as an insurance defense attorney, Foulk served on the other side of the criminal justice system when he practiced criminal defense law from 1980 to 1986. “Defense work is challenging and gave me an opportunity to uphold the Constitution, but I didn’t philosophically agree with defending,” he said. And so, in 1988, when William Cunningham, now president judge of the Erie County Court of Common Pleas, and Erie County district attorney at the time, offered Foulk a position as an assistant district attorney (ADA), Foulk accepted. Foulk held that position for seven years. After moving on to the Office of the Attorney General and then a brief return to the private sector, Foulk ran and won the race for district attorney (DA) in November 1999.

But the transition from defense attorney to ADA and ultimately to DA was not necessarily a smooth one for Foulk. In the spring of 1988, several months before becoming an ADA, Foulk entered a detoxification program at an Erie hospital to begin his fight against alcoholism. That is a fight he continues to win today, 16 years later. Though his experience as an ADA certainly prepared him for many of the responsibilities of holding the top position in that office, it did not prepare him for everything. Until he took the office, he says, he did not realize how challenging handling personnel issues would be. Foulk reflected on a time that he had to accept the resignations of two employees who had failed to disclose information about potential conflicts of interest. Both were also his friends. “It’s very difficult to lose someone from my office because they love their jobs so much and because it has an impact on their families.”

Foulk estimates that today he spends about 25 percent of his time actually handling cases. The cases he chooses to handle include those he considers to be most important to the community. They are the cases involving police officers, firefighters, teachers and cold cases, Foulk explained.

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Foulk devotes a significant amount of his time to projects that go beyond running his office and prosecuting. He has personally committed to helping other lawyers facing alcoholism and other health issues by serving on the executive board of Lawyers Concerned for Lawyers of Pennsylvania, Inc. (LCL-PA). The mission of the LCL-PA, an independent, nonprofit corporation that is affiliated with the Pennsylvania Bar Association and funded in part by the Pennsylvania Supreme Court, is to help lawyers who are dealing with various emotional and mental health problems that cause personal and professional impairment. LCL-PA provides completely confidential assistance to lawyers struggling with substance abuse, gambling, depression and stress. Assistance from the LCL-PA is available 24-hours-a-day and 7-days-a-week through the organization’s toll-free hotline [(888) 999-1941], newsletter, continuing legal education courses and peer assis-

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Close Up

Erie County District Attorney Has Found the Best Job in the World:
A Profile of Bradley H. Foulk

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ience through a statewide network of recovering lawyers and judges. Lawyers interested in more information about LCL-PA should call (800) 335-2572 or visit the “Legal Links” section of the Pennsylvania Bar Association’s Web site.

In the same vein, Foulk has been an active supporter of making treatment and rehabilitation a part of the criminal justice system. In 2000, he helped to start a program to provide drug and alcohol treatment and vocational rehabilitation for first-time offenders. Working in collaboration with President Judge Rusty Cunningham and the Public Defender’s Office, Foulk and his colleagues in the DA’s Office have seen a significant drop in recidivism rates of drug offenders and those committing minor thefts to support their drug habits.

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Foulk also serves on the executive committee of the Pennsylvania District Attorneys Association (PDAA). He speaks with pride of the PDAA’s mentoring programs, “The networking opportunities are great.” Every year the association sponsors a seminar to train new ADAs from across the commonwealth. The program is held in Grantville and has the sole purpose of educating newly-hired ADAs to become successful prosecutors. Guest speakers from various Pennsylvania counties share their knowledge and experience. Foulk is also involved with a Pennsylvania Supreme Court project to develop minimal standards of competence for defense counsel. The project involves developing standards for defending individuals in capital murder cases. He and Pennsylvania Supreme Court Justice J. Michael Eakin, another participant in the project, bring a prosecutorial perspective to the discussion. Foulk is also a proponent of legislation to make the DA’s office a full-time position in every county in Pennsylvania. Currently, that is not the case in about a dozen counties.

Under Foulk’s leadership, the Erie County District Attorneys’ Office has become a significant participant in the local Children’s Advocacy Program. The program, which began in 2000, addresses the needs of physically- and sexually-abused children. With assistance from Hamot Medical Center, which donated 4,000 square feet of space to this program, DAs work in collaboration with professionals from law enforcement, Children’s Services and the Crime Victim Center to interview abused children. The children are provided with free medical attention and psychological counseling. Evidencing the commitment to this program and the cause of helping abused children, Foulk has devoted two full-time district attorneys to child abuse matters, and two full-time county detectives are also assigned to the area. As a result of this collaborative effort, the Erie County DA’s Office has achieved a 98 percent conviction rate in child abuse cases.

Foulk also committed his office to participating with the City of Erie to launch a Weed & Seed program in Erie in 2002. The Pennsylvania Weed & Seed Initiative, a program Gov. Ridge started, is a two-pronged program that first “weeds” blighted areas of the city of drug activity, violent crimes and prostitution. The weeding phase is accomplished by saturating the targeted areas with law enforcement patrols and by sending police officers into the schools to interact with the students. It also involves creating neighborhood watch groups that relay information to the authorities. The second prong of the program, the “seed” phase, rehabilitates and revitalizes the targeted area. Steps leading to the revitalization include refurbishing homes and educational facilities. Working together with the state police, the Erie Bureau of Police, Sheriff’s Department, adult probation and neighborhood watch groups, Foulk and the DA’s Office have enjoyed great success. There has been a decrease in crime in the targeted areas as well as improved working relationships between members of the community and law enforcement officials.

So what comes next for the man who says he has the best job in the world? Foulk says he has no interest in becoming a judge or returning to the private sector. “I have no desire to do anything besides prosecute,” he says. That truly seems to be what he was meant to do.

Discovery in the Context of Administrative Hearings

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Summary

As a practical matter, the best way to obtain discovery that is not authorized under GRAPP or agency-specific rules is through a prehearing conference. Unless otherwise provided, the discovery request may be in the form of a letter or a motion explaining why the requested information is relevant and material. In some situations, the request may actually prompt the scheduling of the conference (which may also be included in your request). At a minimum, it will encourage discovery to be included among the topics to be discussed at the conference. The agency head or presiding officer has the sole discretion to permit the requested discovery and exercises that discretion through the issuance of an order. Finally, if you are unsuccessful in your discovery attempts, it is important to preserve the denial of a discovery request on the record as one of the possible bases for appeal.

Editors’ Note: The author is a member of the James S. Bowman American Inn of Court in Harrisburg, which focuses on Pennsylvania administrative law. The article is extracted from the Gacki/Scott Pupilage Group’s February 2004 presentation. Appreciation is extended to the group for its contributions to this article.
In the Spotlight

Speaking Engagements
Pedro A. Cortés, secretary for the commonwealth, delivered the keynote address at the 16th Annual Pennsylvania Bar Association Minority Attorney Conference in March at the Crowne Plaza Hotel, Harrisburg. The topic was “Roles for the Minority Attorney in the Public and Private Sectors.” Cortés spoke on the complexities presented by an increasing Latino population at the Conference on Diversity at Pennsylvania State University. In April, he delivered the keynote address on “Leadership, Cultural Pride and Empowerment” at the U.S. Hispanic Leadership Institute, Northeast Latino Student Leadership Conference, in King of Prussia.

Terry Keating, deputy chief counsel for litigation to the Department of Insurance, presented “How to Shut Down Illegal Insurers” on behalf of the U.S. Department of Labor in New Jersey in March. The presentation was part of a two-day symposium on the abuses of ERISA as it relates to insurance fraud. In attendance were representatives from the state insurance departments of New York; Maryland; New Jersey; Washington, D.C. and Delaware; and from the Department of Justice; the FBI; and the criminal and civil divisions of the Department of Labor.

Charlene Couch, chief deputy attorney general of the Civil Rights Enforcement Section, Office of Attorney General, gave a presentation for law enforcement practitioners on civil redress at a seminar on hate crimes held at the Montgomery County Fire Academy in April. The seminar was sponsored by the Office of Attorney General.

James Donahue III, chief deputy attorney general, Office of Attorney General’s Antitrust Section, attended the Minimizing Legal Risk in Pharmaceutical Benefit Management conference at the U.S. Chamber of Commerce in Washington, D.C. in March. He served on a federal and state enforcement roundtable that presented an update on civil and criminal investigations and enforcement actions. Donahue also gave a presentation on current developments in the area of antitrust law at the American Bar Association’s spring meeting in April. In addition, he served as a faculty speaker on an audioconference that addressed implications for pharmaceutical benefit management regulation, roles and operations in May.

Linda Williams, chief deputy attorney general of the Office of Attorney General’s Health Care Section, gave a presentation in February before the commonwealth’s Medicare Quality Improvement Organization, known as Quality Insights of Pennsylvania. The presentation emphasized consumer protection issues affecting Medicare beneficiaries. Williams also gave a presentation at a Cancer Pain Initiative seminar in April, which highlighted attorneys general’s activities in the area of end-of-life care and chronic pain management. In addition, she gave a presentation on the PACE programs and the Medicare Drug Discount Card in May at the PA Council of the Blind.

Lawrence M. Cherba, regional attorney for the Drug Strike Force Section of the Office of Attorney General in Allentown, instructed state and local law enforcement officers on terrorism and the legal implications of the Patriot Act, First Amendment, and Fourth Amendment issues and how they interact with state laws at the Northeast Counterdrug Training Center, in January and March. In addition to the anti-terrorism training, Cherba recently instructed at the New Agents Academy for all new agents hired by the Office of Attorney General and presented a course on the use of force in law enforcement for agents from the Bureau of Narcotics Investigation and Drug Control, Medicaid Fraud, Environmental Crimes, Insurance Fraud and the Bureau of Criminal Investigation.

Susan Hensel, assistant general counsel/knowledge manager to the Governor’s Office of General Counsel (OGC), spoke at the Transportation Law Workshop in May. Hensel discussed the OGC’s computerized knowledge management system.

MaryAnne Wesdock, senior assistant counsel at the Environmental Hearing Board, recently spoke at the Environmental Law Forum on Environmental Hearing Board regulations.

Elections/Appointments
Gregory E. Dunlap, deputy general counsel to the Governor’s Office of General Counsel, was appointed by the Pennsylvania Supreme Court as chair of the Pennsylvania Board of Law Examiners in April. Greg served as vice-chair for two years and has been a member of the board since 1999.

Doreen A. McCall, chief counsel to the Pennsylvania Historical and Museum Commission, has been elected to the board of trustees for Westminster College, New Wilmington.

MaryAnne Wesdock, senior assistant counsel at the Environmental Hearing Board, has been elected secretary of the PBA Environmental, Mineral and Natural Resources Law Section. She also currently serves as chair of the Allegheny County Bar Association Environmental Law Section.

Pedro A. Ramos has been appointed acting city solicitor for Philadelphia. Prior to his appointment to the law department, Ramos served as vice president and chief of staff to University of Pennsylvania President Dr. Judith Rodin. Prior to that, he served as president of the Board Education for the School District of Philadelphia.

Jonathan W. Kunkel, assistant counsel to the Department of Corrections, was appointed president of the Friends of the State Museum where he served as first vice-president last year and as a board member for four years.

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In the Spotlight

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John A. Nixon joined the City of Philadelphia Law Department as chair of the Corporate and Tax Group in March. As chair, Nixon reports to the city solicitor and is a member of the law department’s senior management team. Through the Commercial Law Unit and the Tax Unit, this group drafts, reviews and negotiates most of the city’s contracts, leases, bonds, and other commercial and real estate documents; provides legal counsel on major economic development projects; represents the city on delinquent tax collections; and handles all city tax sales and bankruptcy matters.

Awards

John Henderson, Department of State hearing examiner, was recently selected as a recipient of the National Notary Association’s (NNA) March Fong Eu Annual Achievement Award for 2004. The award is given to an individual who has done the most to improve the standards, image, quality and effectiveness of the notary public office. Henderson will receive his award at the 2004 NNA Conference in Philadelphia.

James Donahue III, chief deputy attorney general, Office of Attorney General, Antitrust Section, received a National Association of Attorneys General (NAAG) Marvin Award at the NAAG summer meeting in June. The Marvin Awards, named after Ray Marvin, NAAG’s first executive director, is presented to up to five attorney general staff members who have furthered the goals of the NAAG and demonstrated the ability to build, mobilize, and unify people and institutions working through NAAG to achieve an extraordinary result of national impact for the states.

Lunch & Learn Series: Preparation Paves the Road to Success

By Judith Gilroy, Assistant Counsel, Department of Labor and Industry

Secretary of the Commonwealth Pedro A. Cortés personifies the old Smith Barney commercial. He “achieved his success the old-fashioned way. He earned it.” The first Hispanic appointed to the Governor’s Cabinet in Pennsylvania history, Cortés was named by Hispanic Business Magazine as one of the 100 Most Influential Hispanics in the United States. He was also named as one of the top “Forty under 40” business leaders in Central Pennsylvania by the Central Penn Business Journal. Cortés brought his unique perspective on government service to the Career Enhancement Subcommittee’s Lunch and Learn in April.

Born in Puerto Rico, Cortés was the first member of his family to attend college, graduating from the University of Massachusetts. He was one of the first students to take advantage of the joint degree program offered by The Pennsylvania State University and its Dickinson School of Law, where he earned a master’s degree in public administration along with his law degree. Cortés emphasized that this type of educational background is the ideal preparation for someone who wishes to enter government service as an administrator.

“Luck is opportunity and preparation,” according to Cortés. Cortés said he was prepared when the opportunity presented itself to become executive director of the Governor’s Advisory Commission on Latino Affairs. That position led directly to his current post.

Cortés describes himself as “a humble public servant trying to do good.” His advice for enhancing one’s career is to work on relationships with others. “Allow people to be part of your life. Give back — especially to young people. Always keep doors open to possibilities.”