

# THE COURTS

## Title 207—JUDICIAL CONDUCT

### PART III. JUDICIAL CONDUCT BOARD

[207 PA. CODE CHS. 101 AND 117]

#### Proposed Amendments to Judicial Conduct Board Rules of Procedure

The Judicial Conduct Board proposes to adopt amendments to Rule 2 and Rule 31 of the Rules of Procedure that govern practice before the Board. All communications in reference to the proposed amendments should be sent not later than April 15, 1996 to Vincent J. Quinn, Chief Counsel, Judicial Conduct Board, 225 Market Street, Suite 500, Harrisburg, PA 17101.

#### Annex A

### TITLE 207. JUDICIAL CONDUCT

#### PART III. JUDICIAL CONDUCT BOARD

#### CHAPTER 101. GENERAL PROVISIONS

##### Rule 2. Rules of Construction.

(A) As used in these rules, unless the context otherwise requires:

- (1) Words in the singular number include the plural, and words in the plural include the singular.
- (2) The word "person" shall include corporations, societies, associations, partnerships, and organizations.
- (3) "Shall" is mandatory and "may" is permissive.
- (4) "Knowingly" includes reckless disregard for the truth or falsity of a statement.

(B) **These rules shall be construed to secure just and reliable determinations of probable cause in all matters considered by the Board.**

(C) **An error or defect of procedure shall not confer any substantive rights on any party.**

#### CHAPTER 117. DISPOSITION; CONTINUANCES

Rule 31. Disposition of Complaint[; Continuances].

(A) Except as provided in paragraph (C), within 180 days of [ **a Board decision to proceed with the full investigation, the Board shall take one of the following actions:** ] **the Board's receipt of the Judicial Officer's written response pursuant to Rule 30(B)(2)(c) or written response to any subsequent letter requesting information by the Board, the Board shall:**

- (1) dismiss the complaint upon a finding that there is no **existing** probable cause to file formal charges;
- (2) dismiss the complaint with the issuance of a letter of counsel upon a determination that, even if the alleged conduct occurred, it was not conduct which requires that formal charges be filed, provided that the Judicial Officer:
  - (a) consents in writing;
  - (b) stipulates that the letter of counsel may be used during proceedings involving new complaints against the Judicial Officer; and
  - (c) agrees to and satisfies any conditions required by the Board; or

(3) [ **file** ] **authorize the filing of formal charges with the Court of Judicial Discipline.**

(B) If the Board dismisses a complaint following a full investigation, Chief Counsel shall promptly notify the Judicial Officer and the complainant.

#### [ (C) Continuances

**The Board may continue a matter:**

(1) **upon a determination that further investigation is necessary; or**

(2) **upon notice that additional allegations have been received which may result in another full investigation. ]**

#### (C) Exceptions.

(1) **The Board may continue a full investigation of a matter beyond the 180-day period set forth in paragraph (A) upon a good faith belief that further investigation is necessary.**

(2) **The Board may defer disposition of a complaint pursuant to paragraph (A) upon discovery or receipt of additional, corollary, or cognate allegations which may necessitate an investigation.**

(3) **The receipt of the Judicial Officer's written response to any Rule 30(B) notice or supplemental or investigatory letter is a necessary prerequisite to the tolling and calculation of the 180-day period set forth in paragraph (A). Thus, the 180-day time period is wholly inapplicable if the Judicial Officer fails to file a written response and the investigation will continue to conclusion.**

[Pa.B. Doc. No. 96-282. Filed for public inspection March 1, 1996, 9:00 a.m.]

## Title 231—RULES OF CIVIL PROCEDURE

### PART I. GENERAL

[231 PA. CODE CH. 1000]

Amendment of Rules Governing Judgment on the Pleadings and Summary Judgment; no. 255; doc. no. 5

#### Order

*Per Curiam:*

*And Now,* this 14th day of February, 1996, the Pennsylvania Rules of Civil Procedure are amended as follows:

1. Rule 1034 governing judgment on the pleadings is amended to read as follows.
2. Rule 1035 governing summary judgment is rescinded.
3. New Rules 1035.1 through 1035.5 governing summary judgment are promulgated to read as follows.

This Order shall be effective July 1, 1996 and shall be processed in accordance with Rule of Judicial Administration 103(b).

## Annex A

## TITLE 231. RULES OF CIVIL PROCEDURE

## PART I. GENERAL

## CHAPTER 1000. ACTIONS AT LAW

**Rule 1034. Motion for Judgment on the Pleadings.**

(a) After the **relevant** pleadings are closed, but within such time as not to **unreasonably** delay the trial, any party may move for judgment on the pleadings.

**Official Note:** Only the pleadings between the parties to the motion for judgment on the pleadings must be closed prior to filing the motion.

(b) The court shall enter such judgment or order as shall be proper on the pleadings.

**Rule 1035.1. Motion for Summary Judgment. Definition.**

As used in Rule 1035.1 et seq., "record" includes any

- (1) pleadings,
- (2) depositions, answers to interrogatories, admissions and affidavits, and

**Official Note:** See Definition Rule 76 for the definition of "affidavit." See Rule 1035.4 governing affidavits supporting or defending a motion for summary judgment.

(3) reports signed by an expert witness that would, if filed, comply with Rule 4003.5(a)(1), whether or not the reports have been produced in response to interrogatories.

**Rule 1035.2. Motion.**

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

**Official Note:** Rule 1035.2 sets forth the general principle that a motion for summary judgment is based on an evidentiary record which entitles the moving party to judgment as a matter of law.

The evidentiary record may be one of two types. Under subparagraph (1), the record shows that the material facts are undisputed and, therefore, there is no issue to be submitted to a jury.

An example of a motion under subparagraph (1) is a motion supported by a record containing an admission. By virtue of the admission, no issue of fact could be established by further discovery or expert report.

Under subparagraph (2), the record contains insufficient evidence of facts to make out a prima facie cause of action or defense and, therefore, there is no issue to be submitted to a jury. The motion in this instance is made by a party who does not have the burden of proof at trial and who does not have access to the evidence to make a record which affirmatively supports the motion. To defeat this motion, the adverse party must come forth with

evidence showing the existence of the facts essential to the cause of action or defense.

Oral testimony alone, either through testimonial affidavits or depositions, of the moving party or the moving party's witnesses, even if uncontradicted, is generally insufficient to establish the absence of a genuine issue of material fact. See *Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932); *Penn Center House, Inc. v. Hoffman*, 520 Pa. 171, 553 A.2d 900 (1989).

Only the pleadings between the parties to the motion for summary judgment must be closed prior to filing the motion.

In asbestos litigation, a motion for summary judgment filed by one defendant alleging a ground common to one or more other defendants is deemed filed on behalf of all such defendants. See Rule 1041.1(f).

Partial summary judgment, interlocutory in character, may be rendered on one or more issues of liability, defense or damages.

**Rule 1035.3. Response. Judgment for Failure to Respond.**

(a) The adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying

(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or

**Official Note:** If the moving party has supported the motion with oral testimony only, the response may raise the defense that there is a genuine issue of material fact because the cause of action is dependent upon the credibility and demeanor of the witnesses who will testify at trial. See *Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932); *Penn Center House, Inc. v. Hoffman*, 520 Pa. 171, 553 A.2d 900 (1989).

(2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

(b) An adverse party may supplement the record or set forth the reasons why the party cannot present evidence essential to justify opposition to the motion and any action proposed to be taken by the party to present such evidence.

(c) The court may rule upon the motion for judgment or permit affidavits to be obtained, depositions to be taken or other discovery to be had or make such other order as is just.

(d) Summary judgment may be entered against a party who does not respond.

**Official Note:** Procedural requirements with respect to argument and briefs are governed by local rule.

In certain counties, the failure to respond to a motion may result in the motion being deemed uncontested and the entry of the judgment sought.

See Rule 1035.2 providing for the entry of judgment in whole or in part.

**Rule 1035.4. Affidavits.**

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the signer is competent to testify to the matters stated

therein. Verified or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

**Official Note:** See Section 2503 of the Judicial Code, 42 Pa.C.S. § 2503 for the award of counsel fees as part of taxable costs as a sanction for dilatory conduct or for conduct which is in bad faith.

See Rule of Professional Conduct 3.1 providing that a lawyer shall not assert or controvert an issue unless there is a basis for doing so that is not frivolous, Rule 3.2 providing for reasonable efforts to expedite litigation consistent with the interests of the client and Rule 3.3 prohibiting the making of false statements of material fact or law to a tribunal.

**Rule 1035.5. Procedure When Judgment Is Denied or Is Not Rendered Upon the Whole Case.**

If judgment is denied or is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court when considering the motion may, if practicable, ascertain from the pleadings, the evidence and the parties which material facts relevant to the motion exist without controversy and which are actually controverted. It shall thereupon make an order specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.

**Explanatory Comment**

**Introduction**

New Rules of Civil Procedure 1035.1 through 1035.5 governing summary judgment replace former Rule 1035.

**Rule 1035.1. Motion for Summary Judgment. Definition.**

The term "record" as used in these rules includes: (1) "pleadings," (2) discovery materials, i.e., "depositions, answers to interrogatories, admissions and affidavits," and (3) "reports signed by an expert witness that would, if filed, comply with Rule 4003.5(a)(1), whether or not the reports have been produced in response to interrogatories."

**Rule 1035.2. Motion.**

The essence of the revision set forth in new Rule 1035.2 is that the motion for summary judgment encompasses two concepts: (1) the absence of a dispute as to any material fact and (2) the absence of evidence sufficient to permit a jury to find a fact essential to the cause of action or defense. The former rule was unclear as to whether it encompassed the type of motion which is based upon a record which is insufficient to sustain a prima facie case. New Rule 1035.2(2) is explicit in authorizing such a motion.

The type of motion provided by Rule 1035.2(2) is not new to Pennsylvania practice. In *Godlewski v. Pars Mfg. Co.*, 408 Pa. Superior Ct. 425, 597 A.2d 106 (1991) Judge Hester wrote:

It is clear that if a defendant is the moving party, he may make the showing necessary to support the entrance

of summary judgment by pointing to materials which indicated that the plaintiff is unable to satisfy an element of this cause of action. See *Eckenrod v. GAF Corp.*, *supra* (wherein, by approving grants of summary judgment on motions that were based upon the failure of the plaintiffs to satisfy an element necessary of their case, we *impliedly* utilized this principle); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (wherein the Supreme Court considered the language of F.R.C.P. 56(c), which is similar to that set forth in Pa.R.C.P. 1035(b) and *explicitly* indicated the same) . . . .

Special note should be taken of the requirement under Rule 1035.2(2) that the motion be made after completion of discovery relevant to the motion, including the production of expert reports. While Rule 1035.2(2) is prefaced with the statement that any party may file a motion after the relevant pleadings have closed, the adverse party must be given adequate time to develop the case and the motion will be premature if filed before the adverse party has completed discovery relevant to the motion. The purpose of the rule is to eliminate cases prior to trial where a party cannot make out a claim or a defense after relevant discovery has been completed; the intent is not to eliminate meritorious claims prematurely before relevant discovery has been completed.

The timing of the motion is important. Under Rule 1035.2(1), the motion is brought when there is "no genuine issue of any material fact . . . which could be established by additional discovery or expert report." Under Rule 1035.2(2), the motion is brought "after the completion of discovery relevant to the motion."

New Rule 1035.2 provides that a party may move for summary judgment after the "relevant" pleadings are closed and, in order to provide discretion in the lower court, within such time so as not to "unreasonably" delay the trial. These revisions have been made also to Rule 1034 governing judgment on the pleadings.

**Rule 1035.3. Response. Judgment for Failure to Respond.**

New Rule 1035.3 requires that a response must be filed within thirty days after service of the motion and provides for supplementation of the record. The response provisions of subdivision (a)(1) and (2) correspond to the bases for summary judgment in Rule 1035.2(1) and (2). The rule permits entry of judgment for failure to respond to the motion but does not require it.

**Rule 1035.4. Affidavits.**

New Rule 1035.4 governing affidavits is derived verbatim from the first three sentences of prior Rule 1035(d) and therefore represents no change in practice. The note to the new rule replaces subdivision (f) of the prior rule relating to affidavits made in bad faith or for purposes of delay.

**Rule 1035.5. Procedure When Judgment Is Denied or Is Not Rendered Upon the Whole Case.**

New Rule 1035.5 is a rule of case management based upon former Rule 1035(c). It is related to the concept of a partial judgment set forth in Rule 1035.2 and encourages the use of the motion for summary judgment to simplify and expedite the course of litigation. If judgment is denied or not entered upon the whole case, the rule authorizes the court to simplify the future course of the

action by determining "which material facts relevant to the motion exist without controversy and which are actually controverted."

*By the Civil Procedural Rules Committee*

EDWIN L. KLETT,  
*Chairperson*

[Pa.B. Doc. No. 96-283. Filed for public inspection March 1, 1996, 9:00 a.m.]

## Title 249—PHILADELPHIA RULES

### PHILADELPHIA COUNTY

Pennsylvania Rule of Civil Procedure No. 227.4(h);  
Administrative Doc. No. 001 of 1996

#### Order

*And Now*, this 8th day of February, 1996, it appearing that by Order dated July 28, 1995 the Supreme Court revised Pa.R.C.P. No. 227(h) which provides, *inter alia*, that the Prothonotary shall, upon Praecept of a party, enter judgment upon the verdict of a jury or the decision of a Judge if timely post-trial motions are filed and the Court does not enter an Order disposing of all motions within one hundred and twenty (120) days after the filing of the first post-verdict motion, and it further appearing that the said rule became effective on January 1, 1996, a dispute having arisen as to whether the rule applies to post-verdict motions filed on or after January 1, 1996 or to Praecipes to Enter Judgment filed on or after January 1, 1996, *It Is Hereby Ordered and Decreed* that it is the reasoned decision of the within Court that Rule 227.4(h) applies to post-verdict motions filed on or after January 1, 1996.

Accordingly, the Prothonotary shall not accept for filing Praecipes under Rule 227.4(h) if the post-verdict motions were filed before January 1, 1996.

This Order is issued in accordance with Phila. Civ. R. No. ★51 and Pa.R.C.P. No. 239 and shall become effective immediately. As required by Pa.R.C.P. No. 239, the original Order shall be filed with the Prothonotary in an

Administrative Docket maintained for Orders issued by the President Judge of the Court of Common Pleas of Philadelphia County, and copies shall be submitted to the Administrative Office of Pennsylvania Courts, the Legislative Reference Bureau and the Civil Procedure Rules Committee. Copies of the Order shall also be submitted to Legal Communications, Ltd., *The Legal Intelligencer*, Jenkins Memorial Law Library, and the law library for the First Judicial District.

ALEX BONAVIDACOLA,  
*President Judge*

[Pa.B. Doc. No. 96-284. Filed for public inspection March 1, 1996, 9:00 a.m.]

## Title 255—LOCAL COURT RULES

### FRANKLIN AND FULTON COUNTIES

Amendment of Local Civil Action Rule 39-1920.3;  
Vol. BB, Page 48

#### Order of Court

February 12, 1996, Civil Action Rule 39-1920.3 for the Court of Common Pleas of the 39th Judicial District of Pennsylvania is hereby amended as follows, to be effective thirty (30) days after publication in the *Pennsylvania Bulletin*.

*By the Court*

JOHN R. WALKER,  
*Judge*

#### Rule 39-1920.3. Commencement of the Action.

(a) In addition to all filing fees now or hereafter required to be deposited at the time a complaint in divorce is filed, a standing master/transcription assessment in the amount of \$55.00 shall be deposited commencing April 1, 1996.

[subdivision (b) remains the same].

[Pa.B. Doc. No. 96-285. Filed for public inspection March 1, 1996, 9:00 a.m.]