

**SUPREME COURT OF PENNSYLVANIA
CIVIL PROCEDURAL RULES COMMITTEE**

Proposed Recommendation No. 252

**Proposed Amendment of Rules 1042.3, 1042.6, 1042.8, and 1042.9 and
New Rules 1042.8, 1042.11, and 1042.12 Governing Certificates of Merit**

The Civil Procedural Rules Committee proposes that Rules of Civil Procedure 1042.3, 1042.6, 1042.8, and 1042.9 governing certificates of merit be amended as set forth herein, and that New Rules 1042.8, 1042.11, 1042.12 governing certificates of merit be adopted as set forth herein. The proposed recommendation is being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court of Pennsylvania.

All communications in reference to the proposed recommendation should be sent no later than **June 7, 2011** to:

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Rule 1042.3. Certificate of Merit

(a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either

Note: The requirements of subdivision (a) apply to a claim for lack of informed consent.

(1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or

(2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or

Note: A certificate of merit, based on the statement of an appropriate licensed professional required by subdivision (a)(1), must be filed as to the other licensed professionals for whom the defendant is responsible. The statement is not required to identify the specific licensed professionals who deviated from an acceptable standard of care.

(3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

Note: In the event that the attorney certifies under subdivision (a)(3) that an expert is unnecessary for prosecution of the claim, in the absence of exceptional circumstances the attorney is bound by the certification and, subsequently, the trial court shall preclude the plaintiff from presenting testimony by an expert on the questions of standard of care and causation.

(b)(1) A separate certificate of merit shall be filed as to each licensed professional against whom a claim is asserted.

(2) If a complaint raises claims under both subdivisions (a)(1) and (a)(2) against the same defendant, the attorney for the plaintiff, or the plaintiff if not represented, shall file

(i) a separate certificate of merit as to each claim raised, or

(ii) a single certificate of merit stating that claims are raised under both subdivisions (a)(1) and (a)(2).

(c)(1) A defendant who files a counterclaim asserting a claim for professional responsibility shall file a certificate of merit as required by this rule.

(2) A defendant or an additional defendant who has joined a licensed professional as an additional defendant or asserted a cross-claim against a licensed professional need not file a certificate of merit unless the joinder or cross-claim is based on acts of negligence that are unrelated to the acts of negligence that are the basis for the claim against the joining or cross-claiming party.

(d) The court, upon good cause shown, shall extend the time for filing a certificate of merit for a period not to exceed sixty days. A motion to extend the time for filing a certificate of merit must be filed by the thirtieth day after the filing of a notice of intention to enter judgment of non pros on a professional liability claim under Rule 1042.6(a) or on or before the expiration of the extended time where a court has granted a motion to extend the time to file a certificate of merit, whichever is greater. The filing of a motion to extend tolls the time period within which a certificate of merit must be filed until the court rules upon the motion.

Note: There are no restrictions on the number of orders that a court may enter extending the time for filing a certificate of merit provided that each order is entered pursuant to a new motion, timely filed and based on cause shown as of the date of filing the new motion.

The moving party must act with reasonable diligence to see that the motion is promptly presented to the court if required by local practice.

In ruling upon a motion to extend time, the court shall give appropriate consideration to the practicalities of securing expert review. There is a basis for granting an extension of time within which to file the certificate of merit if counsel for the plaintiff was first contacted shortly before the statute of limitations was about to expire, or if, despite diligent efforts by counsel, records necessary to review the validity of the claim are not available.

(e) If a certificate of merit is not signed by an attorney, the party signing the certificate of merit shall, in addition to the other requirements of this rule, attach to the certificate of merit the written statement from an appropriate licensed professional as required by subdivisions (a)(1) and (2). If the written statement is not attached to the certificate of merit, a defendant seeking to enter a judgment of non pros shall file a written notice of intent to enter a judgment of non pros for failure to file a written statement under Rule 1042.11.

Rule 1042.6. Notice of Intent to Enter Judgment of Non Pros for Failure to File Certificate of Merit. Motion to Determine Necessity to File Certificate. Form of Notice

(a) * * *

(b) * * *

(c) * * *

(d) The notice required by subdivision (a) of this rule shall be substantially in the following form:

(Caption)

**[NOTICE OF INTENTION TO ENTER
JUDGMENT OF NON PROS ON PROFESSIONAL LIABILITY CLAIM]
Notice of Intention to Enter Judgment of Non Pros for
Failure to File a Certificate of Merit**

* * *

Rule 1042.8. Motion to Strike. Defect of Certificate of Merit (NEW)

If a court grants a motion to strike a claim for noncompliance with the requirements of Rule 1042.3(b), the court shall grant the plaintiff twenty days to file certificates of merit which cure the defect.

Rule [1042.8] 1042.9. Sanctions

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Rule [1042.9] 1042.10. Certificate of Merit. Form

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Rule 1042.11. Notice of Intent to Enter Judgment of Non Pros for Failure to File a Written Statement from an Appropriate Licensed Professional.

Form of Notice (NEW)

(a) A defendant seeking to enter a judgment of non pros under Rule 1042.12 shall file a notice of intent to enter a judgment of non pros for failure to file a written statement from an appropriate licensed professional with the certificate of merit.

(b) The notice required by subdivision (a) of this rule shall be substantially in the following form:

(Caption)

**Notice of Intention to Enter Judgment of Non Pros
for Failure to File Written Statement from
an Appropriate Licensed Professional**

To: _____
(Identify Party)

Pursuant to Pennsylvania Rule of Civil Procedure 1042.12, I intend to enter a judgment of non pros against you after thirty (30) days of the date of the filing of this notice if a written statement from an appropriate licensed professional is not filed as required by Rule 1042.3(e).

I am serving this notice on behalf of _____
(Name of party)

The judgment of non pros will be entered as to the following claims:

(State if a judgment is to be entered as to all claims. Otherwise, identify claims set forth in the complaint as to which a judgment of non pros will be entered.)

(Attorney)

(Address)

(Telephone Number)

Rule 1042.12. Entry of Judgment of Non Pros for Failure to File a Written Statement from an Appropriate Licensed Professional. Form of Praecipe (NEW)

(a) The prothonotary, on praecipe of the defendant, shall enter a judgment of non pros against the plaintiff for failure to file a written statement under Rule 1042.3(e) provided that

- (1) no written statement has been filed,
- (2) the defendant has attached to the praecipe a certificate of service of the notice of intention to enter the judgment of non pros, and
- (3) the praecipe is filed no less than thirty days after the date of the filing of the notice of intention to enter judgment of non pros.

Note: The prothonotary may not enter judgment if the written statement has been filed prior to the filing of the praecipe.

Rule 237.1 does not apply to a judgment of non pros entered under this rule.

See Rule 208.2(a)(4) for the content of the certificate of service.

(b) The praecipe for the entry of a judgment of non pros shall be substantially in the following form:

(Caption)

Praecipe for Entry of Judgment of Non Pros Pursuant to Rule 1042.12

To the Prothonotary:

Enter judgment of non pros in the above-captioned matter
against _____ as to
(Identify Party)

(1) all claims against _____.
(Identify Party)

OR

(2) only the following claims against _____:
(Identify Party)

Identify Claims

Date: _____

Attorney for _____
(Identify Party)

Explanatory Comment

The Civil Procedural Rules Committee is proposing amendments to Rule 1042.1 *et seq.* governing the certificate of merit. Currently, the rules of civil procedure provide for dismissal of a complaint for failure to file a certificate of merit. However, they are silent as to procedure when a certificate of merit is filed, but does not comply with the rules, e.g., the basis for the certificate of merit is incorrect, or a certificate of merit lists three defendants when the rules require a separate certificate of merit to be filed against each defendant. Proposed new Rule 1042.8 provides that when a court grants a motion to strike for failure to comply with Rule 1042.3(b), the trial court shall give the plaintiff twenty days to file a new certificate of merit which will cure the defect.

These proposed amendments also add a procedure for when the certificate of merit is not signed by an attorney. New subdivision (e) of Rule 1042.3 would require the attachment of the written statement from an appropriate licensed professional to the certificate of merit. Failure to attach the written statement will allow the defendant seeking to enter a judgment of non pros to file a written notice of intent to enter judgment of non pros. New Rule 1042.11 provides the requirements for filing the 10-day notice, and new Rule 1042.12 provides the requirements for filing the praecipe for entry of judgment of non pros. Suggested forms for both the 10-day notice and praecipe are provided.

The Committee is proposing this amendment for several reasons. First, only an attorney is subject to disciplinary proceedings for abusing the rules of civil procedure governing certificates of merit. Second, it is not unusual for an unrepresented plaintiff to file a certificate of merit without having received a written statement from a licensed professional supporting his or her claim. Third, the rules governing the certificates of merit already make a distinction between an attorney and an unrepresented plaintiff filing a certificate of merit. Current Rule 1042.8 provides for a trial court to impose sanctions only upon a determination that an attorney has violated the rules governing the filing of a

certificate of merit because monetary sanctions are an ineffective remedy to curtail the failure of unrepresented plaintiffs to obtain a written statement from an appropriate licensed professional.

Technical amendments have also been made to Rules 1042.6, 1042.8, and 1042.9, which do not affect practice or procedure.

By the Civil Procedural
Rules Committee

Robert C. Daniels
Chair