

Federal Trade Commission

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and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial. If no such response is filed, summary decision, if appropriate, shall be rendered.

(4) Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the Administrative Law Judge may refuse the application for summary decision or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is appropriate and a determination to that effect shall be made a matter of record.

(5) If on motion under this rule a summary decision is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Administrative Law Judge shall make an order specifying the facts that appear without substantial controversy and directing further proceedings in the action. The facts so specified shall be deemed established.

(b) *Affidavits filed in bad faith.* (1) Should it appear to the satisfaction of the Administrative Law Judge at any time that any of the affidavits presented pursuant to this rule are presented in bad faith, or solely for the purpose of delay, or are patently frivolous, the Administrative Law Judge shall enter a determination to that effect upon the record.

(2) If upon consideration of all relevant facts attending the submission of any affidavit covered by paragraph (b)(1) of this section, the Administrative Law Judge concludes that action by him to suspend or remove an attorney from the case is warranted, he shall take action as specified in §3.42(d). If the Administrative Law Judge concludes, upon consideration of all the relevant facts attending the submission of any affidavit covered by paragraph (b)(1) of this section, that the matter should be certified to the Commission for consideration of disciplinary action against an attorney,

including reprimand, suspension or disbarment, the examiner shall certify the matter, with his findings and recommendations, to the Commission for its consideration of disciplinary action in the manner provided by the Commission's rules.

[35 FR 5007, Mar. 24, 1970, as amended at 50 FR 53305, Dec. 31, 1985; 52 FR 22293, June 11, 1987; 61 FR 50647, Sept. 26, 1996; 66 FR 17628, Apr. 3, 2001]

§ 3.25 Consent agreement settlements.

(a) The Administrative Law Judge may, in his discretion and without suspension of prehearing procedures, hold conferences for the purpose of supervising negotiations for the settlement of the case, in whole or in part, by way of consent agreement.

(b) A proposal to settle a matter in adjudication by consent agreement shall be submitted by way of a motion to withdraw the matter from adjudication for the purpose of considering the proposed consent agreement. Such motion shall be filed with the Secretary of the Commission, as provided in §4.2. Any such motion shall be accompanied by a proposed consent agreement containing a proposed order executed by one or more respondents and conforming to the requirements of §2.32; the proposed consent agreement itself, however, shall not be placed on the public record unless and until it is accepted by the Commission as provided herein. If the proposed consent agreement affects only some of the respondents or resolves only some of the charges in adjudication, the motion required by this subsection shall so state and shall specify the portions of the matter that the proposal would resolve.

(c) If the proposed consent agreement accompanying the motion has also been executed by complaint counsel and approved by the appropriate Bureau Director, the Secretary shall issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve and all proceedings before the Administrative Law Judge shall be stayed with respect to such portions, pending a determination by the Commission pursuant to paragraph (f) of this section.

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(d) If the proposed consent agreement accompanying the motion has not been executed by complaint counsel, the Administrative Law Judge may certify the motion and agreement to the Commission together with his recommendation if he determines, in writing, that there is a likelihood of settlement. The filing of a motion under this subsection and certification thereof to the Commission shall not stay proceedings before the Administrative Law Judge unless the Administrative Law Judge or the Commission shall so order. Upon certification of a motion pursuant to this subsection, the Commission may, if it is satisfied that there is a likelihood of settlement, issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve, for the purpose of considering the proposed consent agreement.

(e) The Commission will treat those portions of a matter withdrawn from adjudication pursuant to paragraph (c) or (d) of this section as being in a non-adjudicative status. Portions not so withdrawn shall remain in an adjudicative status.

(f) After some or all of allegations in a matter have been withdrawn from adjudication, the Commission may accept the proposed consent agreement, reject it and return the matter or affected portions thereof to adjudication for further proceedings or take such other action as it may deem appropriate. If the agreement is accepted, it will be disposed of as provided in § 2.34 of this chapter, except that if, following the public comment period provided for in § 2.34, the Commission decides, based on comments received or otherwise, to withdraw its acceptance of such an agreement, it will so notify the parties and will return to adjudication any portions of the matter previously withdrawn from adjudication for further proceedings or take such other action it considers appropriate.

(g) This rule will not preclude the settlement of the case by regular adjudicatory process through the filing of an admission answer or submission of the case to the Administrative Law

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Judge on a stipulation of facts and an agreed order.

[40 FR 15236, Apr. 4, 1975, as amended at 42 FR 39659, Aug. 5, 1977; 43 FR 51758, Nov. 7, 1978; 50 FR 53305, Dec. 31, 1985; 54 FR 18885, May 3, 1989; 61 FR 50431, Sept. 26, 1996; 61 FR 50647, Sept. 26, 1996; 64 FR 46269, Aug. 25, 1999; 66 FR 17628, Apr. 3, 2001; 66 FR 64143, Dec. 12, 2001]

§ 3.26 Motions following denial of preliminary injunctive relief.

(a) This section sets forth two procedures by which respondents may obtain consideration of whether continuation of an adjudicative proceeding is in the public interest after a court has denied preliminary injunctive relief in a separate proceeding brought, under section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), in aid of the adjudication.

(b) A motion under this section shall be addressed to the Commission and filed with the Secretary of the Commission. Such a motion must be filed within fourteen (14) days after:

(1) A district court has denied preliminary injunctive relief, all opportunity has passed for the Commission to seek reconsideration of the denial or to appeal it, and the Commission has neither sought reconsideration of the denial nor appealed it; or

(2) A court of appeals has denied preliminary injunctive relief.

(c) *Withdrawal from adjudication.* If a court has denied preliminary injunctive relief to the Commission in a section 13(b) proceeding brought in aid of an adjudicative proceeding, respondents may move that the adjudicative proceeding be withdrawn from adjudication in order to consider whether or not the public interest warrants further litigation. Such a motion shall be filed by all of the respondents in the adjudicative proceeding. The Secretary shall issue an order withdrawing the matter from adjudication two days after such a motion is filed, except that, if complaint counsel have objected that the conditions of paragraph (b) of this section have not been met, the Commission shall determine whether to withdraw the matter from adjudication.

(d) *Consideration on the record.* (1) In lieu of a motion to withdraw a matter