

**167.¹ OFFER OF SETTLEMENT; AVOIDABLE LITIGATION EXPENSES: POST-
REJECTION COSTS, INCLUDING CERTAIN FEES AND EXPENSES
INCLUDING CERTAIN FEES AND EXPENSES
SANCTIONS² FOR UNREASONABLE³ REJECTION**

167.1 Generally. A party⁴ who rejects an offer of settlement made in accordance with this rule may be responsible for avoidable litigation & expenses~~sanctioned~~ except in an action brought in a small claims or justice court or under.⁵

- (a) article 5.14 of the Texas Business Corporation Act;⁶
- (b) Rule 42 of the Texas Rules of Civil Procedure in which a class has been certified;⁷
- (c) the Deceptive Trade Practices—Consumer Protection Act, sections 17.41-.63 of the Business and Commerce Code;⁸
- (d) the Family Code;⁹
- (e) chapter 410, subchapters F and G of the Labor Code.^{10 11}

¹More of the purpose and intended operation of this rule can be explained in comments as was done, for example, in the discovery rules changes.

²The use of sanctions in the procedural rules to shift costs, expenses, and attorney fees for improper conduct has solid precedent. See TEX.R.CIV.P. 13 (frivolous pleadings); TEX.R.CIV.P. 215 (discovery abuse); TEX.R.APP.P. 45 and 62 (frivolous appeals). The improper conduct addressed by this rule is unreasonable refusal to settle. The sanction must, of course, fall on the culprit, so whoever controls settlement -- an insurer, for example - bears the responsibility for sanctions. See 167.6(c).

³This is the essential point. The rules should not force settlement of claims that should fairly be litigated, but neither should they condone unnecessary or harassing litigation. The rule describes what is unreasonable.

⁴This includes governmental entities and cases like eminent domain, delinquent taxes, etc. Some proposals would exclude actions by and against the government.

⁵Committee discussion. Transcript, p. 8211. Query. If the lawsuit asserts claims, some excluded (DTPA) some not excluded, is the rule operative to the entire proceeding?

⁶A settlement of a shareholder derivative suit must have court approval. TEX.BUS.CORP.ACT art. 514(I).

⁷A settlement of a certified class action must have court approval. TEX.R.CIV.P. 42(e).

⁸The DTPA has its own remedies for refusal to settle. TEX.BUS.&COM.CODE §§17.505-.5052.

⁹It is not yet clear how procedures like these could apply in family cases.

¹⁰A settlement of a workers' compensation case must be approved by the court. TEX.LABOR CODE § 410.256.

¹¹The rule does not apply to cases in which group settlement must be approved by the court (i.e., (a), (b),

167.2 Making an Offer.

(a) *Requirements.* The offer must:

(1) be made

(A) for cases governed by

(i) Rule 190.2, more than thirty days after the appearance in the case of the offeror or offeree, whichever is later;¹²

(ii) Rule 190.3 or Rule 190.4, more than ninety days after the appearance in the case of the offeror or offeree, whichever is later; and,

~~(iii) Rule 190.4, on or after a date to be stated in the scheduling order; and~~

(B) no less than thirty ten days before the date a case is set for a conventional trial on the merits set for trial¹³, or if in response to a prior offer, within three days of the prior offer, whichever is

and (e)), cases in which the consequences for refusing to settle are provided by statute (i.e., (c)), and family law cases. Some proposals would also exclude:

- ! actions for which recovery of attorney fees and costs is provided by statute. But this is so large a category of cases (see TEX.CIV.PRAC.&REM.CODE § 38.001) that the effect of the rule would be severely limited. Moreover, it is not clear why such cases should be excluded. The principal argument appears to be that application of the rule in such cases may be more difficult.
- ! actions for nonmonetary relief. Again, it is not clear why, other than that the rule is more difficult to apply. The proposed change in FED.R.CIV.P. 68 would have included such actions. Thus, such cases are not excluded entirely under this rule, although a claim for nonmonetary relief may not provide a basis for the imposition of costs pursuant to this Rule.
- ! ~~actions in which damages are capped. The concern is that settlement offers will be distorted by the cap. For example, if the plaintiffs recovery were capped at \$100,000, the defendant could trigger the rule by a \$70,000 offer, even if the plaintiff believed damages might well exceed the cap. Plaintiffs could use similar strategies against defendants. But many cases asserting actions with a damage cap would not be subject to this strategic abuse. The better solution is to deal with strategic abuse rather than except entire categories of cases.~~
- ! ~~actions in the justice and small claim courts. It would be difficult for the rule to apply in eviction cases, for example, but there might be instances when it would apply. Many unsophisticated litigants would not be able to use the rule effectively, and perhaps that is a reason to exclude such cases.~~

¹²Various proposals differ greatly over this start time. The point of the rule is to encourage early evaluations of cases, but often some discovery is needed. The party with less information to start with may be unduly pressured by a quick offer.

¹³ Trial commences when the first witness is called to testify.

later.¹⁴

- (2) be in writing;
 - (3) identify the party or parties making the offer and the party or parties to whom the offer is being made;
 - (4) state that it is being made in accordance with this rule;
 - (5) offer to settle all the claims for monetary relief¹⁵ in the action between the offeror and offeree;¹⁶
 - (6) specify the terms of settlement, including the amount of attorneys' fees being claimed
! if the offeror has a claim against the offeree for the recovery of attorneys' fees;¹⁷
 - (7) specify a deadline date by which the offer must be accepted — "the acceptance date" — which must be ~~either~~ a date at least fourteen days after the offer is served ~~or the date set for trial, whichever is earlier~~; and
 - (8) be served¹⁸ on the offeree.
- (b) *Successive offers.* A party may make an offer after having made or rejected a prior offer. A rejection of any¹⁹ offer that exceeds an offeror's prior offers, if any,

¹⁴While the purpose of the rule is to encourage early evaluation of cases, it can be anticipated that often settlement discussions will be more serious very close to trial. Even if the only savings were trial expenses, the purpose of the rule would be served.

¹⁵This includes only monetary ~~and non-monetary~~ claims. A nominal offer could ~~not~~ be the basis for ~~sanctions—the imposition of costs~~ if not made in good faith. See 167.6(c)(3)(A). Should not be removed?

¹⁶Difficulties in applying the rule may arise in multi-party cases when only some of the parties are attempting to settle. An offer to one party that is conditioned on acceptance of another offer to another party may also give rise to difficulties, but these factors should be considered by the court under 167.6(d)(3). This point can be made in a comment.

¹⁷Some proposals require that the offeror agree to rendition of judgment consistent with the terms of settlement, but agreement to a judgment should simply be on term an offer may make.

¹⁸This rule can specify that service is under Rule 21 a (as for other post-petition papers) and include Rules 4 and 5 (which prescribe time periods), or that point, which ought to be apparent, can be made in a comment.

¹⁹Imposing costs for the rejection of the last offer that exceeds all prior offers is intended to encourage parties to arrive at a realistic offer sooner than later. While it might be argued that imposing costs only for the rejection of a party's last offer would not seem to encourage plaintiffs to make lower offers earlier, the fact that plaintiffs can only recover costs if the judgment is at least 130% of their highest offer provides a strong incentive for plaintiffs not to make their highest offer unrealistically high. Additionally, the dynamics of settlement negotiations

is subject to imposition of cost-avoidable litigation expenses ~~sanctions~~ under this rule.

- (c) *Modification of time limits* The court may modify any of the time limits proscribed by ~~in~~ this Rule by written order entered before trial for good cause shown upon the motion of any party or on its own initiative.

167.3 Withdrawal of Offer. An offer can be withdrawn before it is accepted. Withdrawal is effective when written notice of the withdrawal is served on the offeree.²⁰ Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for ~~sanctions imposing cost-avoidable litigation expenses~~ under this rule.

167.4 Acceptance of Offer. An offer that has not been withdrawn can be accepted only by written notice served on the offeror by the acceptance date. When an offer is accepted, the offeror or offeree may file the offer and acceptance along with a motion for judgment.

167.5 Rejection of Offer. ~~An offer that is not withdrawn or accepted is rejected.~~ An offer may also be rejected by written notice served on the offeror by the acceptance date, or by failure to respond on or before the acceptance date; which is deemed to be a rejection.

167.6 ~~Sanctions~~ Imposition of Cost-Avoidable litigation expenses.

(a) *Availability.* If the judgment is to be rendered²¹ ~~and is~~ significantly less favorable to a party than an offer the party rejected, the offeror may move ~~sanctions~~ for imposition of cost-avoidable litigation expenses. A motion to impose avoidable litigation expenses made after judgment is signed is a motion to modify, correct, or reform the judgment and is governed by the timetables in Rule 329b. –A judgment is significantly less favorable than an offer –

- (1) to a party making a claim if:

(A) ~~—~~ a monetary award – including, if awarded, only those costs, attorney fees, and interest incurred as of the date of the offer was

usually serve to discourage ever – increasing offers from plaintiffs. Awarding costs only from the time of the highest offer should encourage defendants to make higher offers earlier, when expenses can be avoided. Sanctioning the rejection of any offer, not just the last offer, appears to be the most common proposal. Sanctioning only the rejection of a party's last offer would not seem to encourage plaintiffs to make lower offers earlier and defendants to make higher offers earlier, which expenses can be avoided. Thus, for example, a plaintiff who offered \$10,000 sixty days before trial, \$20,000 thirty days before trial, and \$30,000 ten days before trial, and who recovered \$20,000, would be entitled to sanctions under the rules as written, but not if only the last offer mattered. By the same token, a defendant who offered \$30,000 sixty days before trial, \$20,000 thirty days before trial, and \$10,000 ten days before trial, and who suffered a \$20,000 judgment, would be entitled to sanctions under the rule as written, but not if only the last offer mattered. But the issue is not a simple one.

²⁰ It should be noted, here and elsewhere, that service is ordinarily effective upon the sender's completion of the prescribed process and does not await receipt.

²¹ The rule is not limited to judgments on verdicts but includes, for example, summary judgments, judgments after directed verdicts, and judgments notwithstanding verdicts.

rejected – is less than 70%²² of the amount offered;²³ and

~~(B) — a nonmonetary award is at least substantially all²⁴ of the nonmonetary relief sought.~~

(2) to a party against whom a claim is made if:

(A) — ~~that portion of a monetary award – including costs, attorney fees, and interest found by the court to have been – attributable to the period of time before the offer was rejected is more than 130% of the amount offered, and~~

~~(B) — a nonmonetary award is at least substantially all of the nonmonetary relief sought.~~

(b) *Amount.* The court, after a hearing at which the parties may present evidence, must²⁵ award the offeror as ~~sanctions cost~~ avoidable litigation ~~s expenses~~ those amounts reasonably and necessarily²⁶ ~~incurred by~~ required to compensate the offeror after the offer was rejected for post-rejection and prejudgment:

(1) court costs;²⁷

(2) fees and expenses for no more than two testifying expert witnesses²⁸ who are not regular employees of the offeror²⁹ (but not for consulting expert witnesses); and

²²Some proposals have a 10% differential. The margin of error should reflect the usual difficulties involved in evaluating cases for settlement.

²³Of course, all of the terms of the offer must be considered in determining "the amount offered", so that a pay-out over time may be worth less than immediate payment, and a secured offer may be worth more than an unsecured one. This point can be made in a comment. ~~A comment should also warn against use of the margin of error to determine the amount of the offer in cases in which damages are capped.~~

²⁴~~The point should be made in a comment that "substantially all" is meant to incorporate the same margin of error for measuring monetary offers.~~

²⁵This initial proposition is nondiscretionary. Discretion can be employed in the situations later described in 167.6(d)(3).

²⁶Nothing is said specifically about contingent fee arrangements, but under existing law, which can be referenced in a comment, such agreements may be taken into account in determining a reasonable fee.

²⁷Court costs are defined by rule, case law, or contract. ~~only in the case law, not by rule or statute.~~ See Allen & Ellis, What are Taxable Court Costs in Texas?, HOUSTON LAWYER (Sept.-Oct. 1998).

²⁸The rule does not specify which two.

²⁹A party would not ordinarily pay its own employee a fee for expert testimony.

(3) reasonable attorney fees and expenses, if the offeror was represented by an attorney.³⁰

~~(c) *Person Liable.* Sanctions must be imposed on the person, or persons jointly, who had the right to accept or reject the offer, which may be an insurer.~~³¹

~~(c)~~ (d) Limitations and Exceptions. The imposition of avoidable litigation expenses under this rule ~~sanctions~~ is subject to the following limitations and exceptions:

(1) ~~sanctions cost~~avoidable litigation s expenses may not exceed \$50,000;³²

(2) ~~sanctions cost~~avoidable litigation s expenses imposed on a ~~claimant party~~ with respect to its claims for monetary relief may not exceed the amount awarded the ~~claimant party~~ by the judgment; and³³

(3) the court may reduce the amount of ~~sanctions cost~~avoidable litigation s expenses awarded or refuse to award any amount of ~~sanctions cost~~avoidable litigation s expenses at all only if the court determines in ~~detailed~~, written findings³⁴ that an imposition of ~~sanctions cost~~avoidable litigation s expenses:

(A) would unjustly punish a ~~party~~ or unjustly reward unfair, strategic conduct rather than a good faith attempt to reach a settlement,³⁵

(B) would not further the purpose of this rule in promoting reasonable settlements and avoiding the expense to the public and to the

³⁰ Committee discussion (Page 2003). In a multi-party case, should the attorney's fees be segregated?

~~³¹ Sanctions may be imposed irrespective of damage caps or coverage limitations.~~

³² This absolute dollar limit ought to be at the 70- or 90-percentile level of cases affected, so that cases with exceptionally large trial expenses are not subjected to a "lottery" kind of rule.

³³ These subsections apply independently. Thus, for example, a ~~sanction costs~~ imposed on a claimant cannot be as much as the amount awarded by judgment if that amount exceeds \$50,000. A defendant who has a legitimate counterclaim for monetary relief is also protected from suffering an imposition of costs in excess of its monetary recovery on its claim. A defendant may not benefit from this provision by asserting a frivolous claim for monetary relief.

³⁴ The trial court must have enough discretion to prevent an unjust or perverse application of the rule, but not so much that it can simply refuse to follow the rule. The requirement that findings be made is intended to provide an appellate court with an adequate, understandable explanation of the reasons for not applying the rule in a particular situation.

³⁵ ~~For example, in a case in which damages are capped, refusal of an offer that attempts to make strategic use of that cap should not be subject to sanctions.~~

parties of unnecessary litigation,

⁷
(C) would otherwise include an amount the trial court determines is unreasonable or unnecessary.

The following FACTORS SHOULD BE FOOTNOTE to (B) above

(C) In determining the amount of reduction, if any, under 167.5c(3)(A)-(C), the court should consider, along with any other relevant factor, the following~~In determining the reasonableness of the amount of costs imposed, the court shall also consider, along with all other relevant material, the following factors:~~

(i) the then-apparent merit or lack of merit in the claim;³⁶

(ii) the number and nature of the offers made by the parties;

~~(iii) the closeness of questions of law and fact in issue;~~

³⁶i.e., apparent at the time of rejection of the offer.

- (iii) the closeness of questions of law and fact in issue;
- (iv) whether the party making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer;
- (v) whether the suit was in the nature of a test case presenting questions of far-reaching importance ~~affecting nonparties~~;
- (vi) the amount of this additional delay, cost and expense that the party making the offer reasonably would be expected to incur if the litigation were to be prolonged; and
- (vii) whether there is evidence that the rejecting party has a history of suffering the imposition of ~~cost~~ avoidable litigation ~~s~~ expenses under this Rule that would indicate a pattern or practice of unreasonable litigation conduct.
(Jacks' proposal from April 15 email)

(4). The trial court's written findings required by this rule are to be prepared in accordance with the timetable in Texas Rule of Civil Procedure 297, may be dictated into the record, appear in the judgment, or in a separate writing, and may be reviewed on appeal, if properly challenged to determine if there is substantial evidence in the record to support the finding. SUGGESTED BY Justice Gray

167.7 Evidence Not Admissible. Evidence relating to an offer made under this rule is not admissible except for purposes of enforcing a settlement agreement or obtaining ~~sanctions~~ avoidable litigation expenses under this rule. The provisions of this rule may not be made known to the jury by any means.

167.8 Other Dispute Resolution Mechanisms Not Affected. This rule does not apply to any offer made in a mediation proceeding and should not affect other alternative dispute resolution mechanisms. The rule does not apply to or preclude offers of settlement that do not comply with the rule.

167.9 Appellate Review. A judgment awarding ~~cost~~ avoidable litigation ~~s~~ expenses or reducing or refusing to award ~~cost~~ avoidable litigation ~~s~~ expenses under 167.6(c) may be reviewed for an abuse of discretion on the appeal of the judgment.