

Walker, Marti

From: Richard G. Munzinger <Rmun@scotthulse.com>
Sent: Monday, June 17, 2019 3:44 PM
To: Walker, Marti
Cc: 'dpeeples36@yahoo.com'; 'Schenkkan, Pete'; Jeffrey S. Boyd (Jeff.Boyd@txcourts.gov); ecarlson@stcl.edu; 'wainwrightd@gtlaw.com'; Elaine Carlson (elainecarlson@comcast.net) (elainecarlson@comcast.net); nina.cortell@haynesboone.com; rhardin@rustyhardin.com; 'cenoch@enochkever.com'; 'Martha.Newton@txcourts.gov'
Subject: Report of Rule 167 Subcommittee
Attachments: Correspondence to Ms. Newton.pdf; TRCP 167.pdf

****RECEIVED FROM EXTERNAL SENDER – USE CAUTION****

Rule 167.2(e)(2) imposes a 60-day waiting period after the appearance of the offeror or offeree, whichever is later, before an offer of settlement can be made under the rule. Subsection 167(b)(4) requires that the terms of a settlement offer include "attorney fees ... that would be recoverable up to the time of the offer." In 2017, former Justices Wainwright and Enoch raised the issue of whether the 60 day waiting period was too long in cases involving later joined parties and as a practical matter possibly preventing use of the rule. (Their correspondence with Ms. Newton, Rules Attorney, raising the issue is attached as is the text of Rule 167.)

Apparently some practitioners report that the 60-day waiting period is often unnecessary and increases the amount required to settle a claim under the Rule. For example, assume that at the time the plaintiff sues a defendant, only \$250 in attorney's fees have been incurred. No further fees are then incurred, as the plaintiff waits to see whether the defendant will appear and not default. When the plaintiff either learns the defendant will appear or actually answers the lawsuit, the plaintiff's lawyer then has 60 days during which he can incur additional fees that must be considered. So, despite the defendant recognizing that the case should be settled, and knowing it could be settled while accounting for \$250 in fees, the defendant cannot make the offer to settle for at least 60 days. And the plaintiff's lawyer is free to start billing to the file, investigating, drafting discovery, etc. So as a result, the defendant can't offer to settle covering only \$250 in fees, but must now account for fees incurred during that 60-day period — perhaps as much as several thousands of dollars that may have been totally unnecessary to the settlement process, but the defendant had no hope to avoid with an early settlement offer.

The Court asks the Advisory Committee's advice whether the 60-day waiting period should be eliminated or shortened.

Reviewing the transcripts from April and June 2003, it appears the Advisory Committee was concerned to allow both plaintiffs and defendants sufficient time to evaluate the case to determine whether to invoke the Rule. In the 2003 meetings there was extensive discussion and general concern that parties should not be forced to make a decision under the Rule without sufficient time to obtain information, including discovery, allowing a considered judgment. The Rule as phrased applies the time limit to later joined parties as well as the original parties, giving all parties the 60 days to consider and make a decision as to invoking the Rule.

The Subcommittee believes that the original discussions in 2003 of the time periods were extensive and properly respectful of the needs of counsel to have information to make an informed judgment and believes that there is no reason to change those time periods insofar as applicable to the original parties to a case. The Subcommittee members have had no experience regarding later joined parties and have no recommendation, believing that the entire SCAC's experience should be considered on that issue.

By copies of this email to Justices Enoch and Wainwright the Subcommittee invites their comments.

Richard G. Munzinger

Attorney

Direct: 915.546.8231 **Main:** 915.533.2493 **Fax:** 915.546.8333

rmun@ScottHulse.com | [vCard](#) |  | ScottHulse.com

ScottHulse PC | The Value of Commitment®

One San Jacinto Plaza

201 E. Main Dr., Ste. 1100, El Paso, TX 79901

CONFIDENTIALITY NOTICE

The information contained in this ELECTRONIC MAIL transmission is confidential. It also may be protected by and subject to the attorney-client privilege or be privileged work product or proprietary information. This ELECTRONIC MAIL transmission and the information contained in or attached as a file to it are intended for the exclusive use of the addressee(s). If you are not the addressee (or one of the addressees), you are not an intended recipient; if you are not an intended recipient, you hereby are notified that any use, disclosure, dissemination, distribution (other than to the addressee(s)), copying or taking of any action because of this information are strictly prohibited.

Disclaimer

The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and others authorized to receive it. If you are not the recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.

This email has been scanned for viruses and malware, and may have been automatically archived by **Mimecast Ltd**, an innovator in Software as a Service (SaaS) for business. Providing a **safer** and **more useful** place for your human generated data. Specializing in; Security, archiving and compliance. To find out more [Click Here](#).