

- 14 (a) *Requirements.* The offer must
- 15 (1) be made
- 16 (A) For cases governed by (i) Rule 190.2, more than thirty days
17 after the appearance in the case of the offeror or offeree,
18 whichever is later;¹⁰ (ii) Rule 190.3, more than ninety days after
19 the appearance in the case of the offeror or offeree, whichever is
20 later; (iii) Rule 190.4, on or after a date to be stated in the
21 scheduling order; provided, however, that if discovery is stayed
22 in any of the foregoing cases, the applicable time period shall
23 run from the date discovery may commence; and
- 24
- 25 (B) no less than thirty days before the date of trial, or if in response
26 to a prior offer, within three days of the prior offer, whichever is
27 later.¹¹
- 28 (2) be in writing;
- 29 (3) identify the party or parties making the offer and the party or parties to
30 whom the offer is being made;
- 31 (4) state that it is being made in accordance with this rule;
- 32 (5) offer to settle all of the claims for monetary relief¹² in the action
33 between the offeror and offeree;¹³
- 34 (6) specify the terms of settlement¹⁴, including the amount of attorneys’
35 fees being claimed if the offeror has a claim against the offeree for the
36 recovery of attorneys’ fees.
- 37 (7) specify a date by which the offer must be accepted – “the acceptance
38 date” – which must be either a date at least fourteen days after the offer

¹⁰ Various 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.

¹¹ While 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.

¹² This includes only monetary claims. A nominal offer could not be the basis for the imposition of costs if not made in good faith. See 167.6(d)(3)(A).

¹³ Difficulties 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.

¹⁴ Some proposals require that the offeror agree to rendition of judgment consistent with the terms of settlement, but agreement to a judgment should simply be one term offer may make.

- 39 is served; and
- 40 (8) be served¹⁵ on the offeree.
- 41 (b) *Successive offers.* A party may make an offer after having made or rejected a
42 prior offer. A rejection of an¹⁶ offer that exceeds an offeror’s prior offers, if
43 any, is subject to imposition of costs under this rule.
- 44 (c) *Modification of time limits.* The court may modify any of the time limits in
45 this Rule by written order entered before trial for good cause shown upon the
46 motion of any party or on its own initiative.
- 47 **167.3 Withdrawal of offer.** An offer can be withdrawn before it is accepted. Withdrawal is
48 effective when written notice of the withdrawal is served on the offeree.¹⁷ Once an
49 unaccepted offer has been withdrawn, it cannot be accepted or be the basis for
50 imposing costs under this rule.
- 51 **167.4 Acceptance of Offer.** An offer that has not been withdrawn can be accepted only by
52 written notice served on the offeror by the acceptance date. When an offer is
53 accepted, the offeror or offeree may file the offer and acceptance along with a motion
54 for judgment.
- 55 **167.5 Rejection of Offer.** An offer may be rejected by written notice served on the offeror
56 by the acceptance date, or by failure to respond on or before the acceptance date;
57 which, is deemed to be a rejection.
- 58 **167.6 Imposition of Costs.**
- 59 (a) *Availability.* If the judgment to be rendered¹⁸ is significantly less favorable to
60 a party than an offer the party rejected, the offeror may move for imposition of
61 costs. A judgment is significantly less favorable than an offer –
- 62 (1) to a party making a claim if a monetary award – including awarded,

¹⁵ This rule can specify that service is under Rule 21a (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 made be in a comment.

¹⁶ Imposing 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 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. But the issue is not a simple one.

¹⁷ 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.

¹⁸ The rule is not limited to judgments on verdicts but includes, for example, summary judgments, judgments after directed verdicts, and judgments notwithstanding verdicts.

- 63 only those costs, attorney fees, and interest incurred as of the date the
64 offer was rejected – is less than 70%¹⁹ of the amount offered;²⁰ and
- 65 (2) to a party against whom a claim is made if that portion of a monetary
66 award – including costs, attorney fees, and interest found by the court
67 to have been – attributable to the period of time before the offer was
68 rejected is more than 130% of the amount offered.
- 69 (b) *Amount.* The court, after a hearing at which the parties may present evidence,
70 must²¹ award the offeror as costs those amounts reasonably and necessarily²²
71 required to compensate the offeror for post-rejection and pre-judgment:
- 72 (1) court costs;²³
- 73 (2) fees and expenses for no more than two testifying expert witnesses²⁴
74 who are not regular employees of the offeror²⁵ (but not for consulting
75 expert witnesses); and
- 76 (3) attorney fees and expenses, if the offeror was represented by an
77 attorney.
- 78 (c) *Limitations and Exceptions.* The imposition of costs is subject to the following
79 limitations and exceptions:
- 80 (1) costs may not exceed \$50,000;²⁶
- 81 (2) Costs imposed on a party with respect to its claims for monetary relief
82 may not exceed the amount awarded the party by the judgment; and²⁷

¹⁹ Some proposals have a 10% Differential. The margin of error should reflect the usual difficulties involved in evaluating cases for settlement.

²⁰ Of 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.

²¹ This initial proposition is nondiscretionary. Discretion can be employed in the situations later described in 167.6(d)(3).

²² Nothing is said specifically about contingent fee agreements, but under existing law, which can be referenced in a comment, such agreements may be taken into account in determining a reasonable fee.

²³ Court costs are defined by rule, case law, or contract. See Allen & Ellis, *What are Taxable Court Costs in Texas?*. Houston Lawyer (Sept.-Oct. 1998).

²⁴ The rule does not specify which two.

²⁵ A party would not ordinarily pay its own employee a fee for expert testimony.

²⁶ 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.

²⁷ These subsections apply independently. Thus, for example, 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

83 (3) the court may reduce the amount of costs awarded or refuse to award
84 any amount of costs at all if the court determines in detailed, written
85 findings²⁸ that an imposition of costs:

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

89 (B) would not further the purpose of this rule in promoting
90 reasonable settlements and avoiding the expense to the public
91 and to the parties of unnecessary litigation.

92 In determining the reasonableness of the amount of costs imposed, the
93 court shall also consider, along with all other relevant material, the
94 following factors:

95 (i) the then-apparent merit or lack of merit in the claim;²⁹
96

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

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

100 (iv) whether the party making the offer had unreasonably
101 refused to furnish information necessary to evaluate
102 the reasonableness of the offer;

103 (v) whether the suit was in the nature of a test case
104 presenting questions of far-reaching importance
105 affecting nonparties; and

106 (vi) the amount of this additional delay, cost and expense
107 that the party making the offer reasonably would be
108 expected to incur if the litigation were to be prolonged.

109 **167.7 Evidence Not Admissible.** Evidence relating to an offer is not admissible except for
110 purposes of enforcing a settlement agreement or obtaining costs under this rule. The
111 provisions of this rule may not be made known to the jury by any means.

of its monetary recovery on its claim. A defendant may not benefit from this provision by asserting a frivolous claim for monetary relief.

²⁸ 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.

²⁹ i.e., apparent at the time of rejection of the offer.

112 **167.8 Other Dispute Resolution Mechanisms Not Affected.** This rule does not apply to
113 any offer made in a mediation proceeding and should not affect other alternate dispute
114 resolution mechanisms. The rule does not apply to or preclude offers of settlement
115 that do not comply with the rule.

116 **167.9 Appellate Review.** A judgment awarding costs or reducing or refusing to award costs
117 under 167.6(c) may be reviewed for an abuse of discretion on the appeal of the
118 judgment.