

# IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 03-- **9160**

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## AMENDMENTS TO THE TEXAS RULES OF CIVIL PROCEDURE

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**ORDERED** that:

1. Rule 42 of the Texas Rules of Civil Procedure is amended as follows, effective January 1, 2004, except that Rule 42(I) applies only in cases which were pending on September 1, 2003.
2. Rule 167 of the Texas Rules of Civil Procedure is added as follows, effective January 1, 2004, only in cases filed on or after that date.
3. Rule 8a of the Texas Rules of Civil Procedure is added as follows, effective January 1, 2004, and applies only to a referral fee that is paid or agreed to be paid on or after the effective date. A referral fee that is paid or agreed to be paid before the effective date is not covered by the addition of Rule 8a.
4. The Clerk is directed to:
  - a. file a copy of this Order with the Secretary of State;
  - b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;
  - c. send a copy of this Order to each elected member of the Legislature; and

d. submit a copy of the Order for publication in the *Texas Register*.

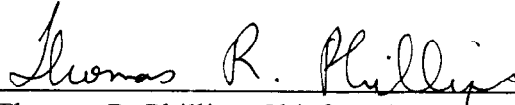
5. These amendments may be changed in response to comments received before December 31, 2003. Any interested party may submit comments in writing as follows:


by mail addressed to Rules Attorney  
The Supreme Court of Texas  
P.O. Box 12248  
Austin TX 7871


by fax to the attention of the Rules Attorney at 512-463-1365

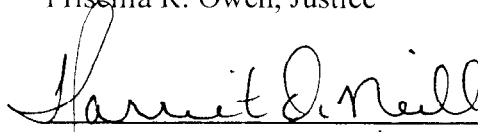
by email to [chris.griesel@courts.state.tx.us](mailto:chris.griesel@courts.state.tx.us).

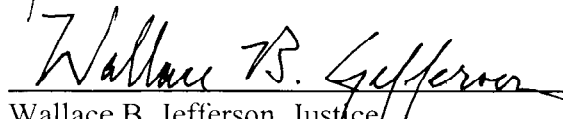
SIGNED AND ENTERED this 9th day of October, 2003.

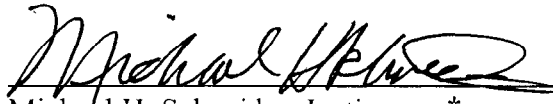
  
Thomas R. Phillips, Chief Justice

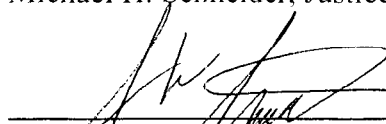
  
Nathan L. Hecht, Justice

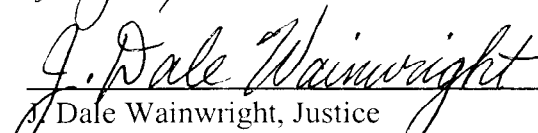
  
Priscilla R. Owen, Justice

  
Harriet O'Neill, Justice \*

  
Wallace B. Jefferson, Justice

  
Michael H. Schneider, Justice \*

  
Steven Wayne Smith, Justice

  
J. Dale Wainwright, Justice

\*JUSTICES O'NEILL and SCHNEIDER concur in the Order to the extent it relates to Rule 42 and Rule 167 only, and dissent to the Order as it relates to Rule 8a.

JUSTICE O'NEILL, joined by JUSTICE SCHNEIDER, dissenting to Order Adopting Rule 8a of the Texas Rules of Civil Procedure.

Recognizing that the rule remains subject to change based upon comments received, I dissent to the Court's adoption of Rule 8a governing referral fees. Rule 8a bears no logical relationship to the rules governing offers of settlement and class actions, which the Court adopts today pursuant to legislative mandate. Moreover, the core function of the referral rules the Court adopts is to govern attorney conduct. Accordingly, if such a rule is to be promulgated, it should be as a Rule of Professional Conduct, in accordance with section 81.024 of the Government Code, not as a Rule of Civil Procedure. As far as I can tell, other jurisdictions that have adopted a similar rule have done so by professional conduct rules or by statute, and not as a matter of civil procedure. I encourage members of the Bar and the public to offer comments on the procedure by which the Court has adopted this rule, as well as on the rule's substance.

## 8a. REFERRAL FEES

**8a.1 Referral Fee Defined.** A referral fee is a payment of money or anything of value:

- (a) made by any person in consideration of:
  - (1) the referral of a client or case, or
  - (2) the solicitation of a client or a case by any means that does not include the name of lead counsel or lead counsel's law firm; and
- (b) made to an attorney who does not, and is not reasonably expected to, provide professional services in the case:
  - (1) that are substantial; and
  - (2) for which the payment would be a reasonable fee apart from the referral.

**8a.2 Disclosure.** The attorney in charge for a party must file with the court a notice disclosing every referral fee paid or agreed to be paid with respect to the party. The notice must:

- (a) state the amount and date of each payment made or agreed to be made;
- (b) state the name, address, telephone number, and state bar identification number of each attorney to whom a payment has been made or is to be made; and
- (c) state that the client has approved each such payment or agreement.

**8a.3 Time for Disclosure.** An attorney in charge must make the disclosure required by Rule 8a.2 within 30 days of the attorney's first appearance as attorney in charge. Thereafter, an attorney in charge must disclose any previously undisclosed payment of a referral fee or agreement to pay a referral within 30 days of the date the payment or agreement is made.

**8a.4 Sanctions.**

- (a) *Grounds for sanctions.* The court must impose just sanctions on an attorney if the court finds that:

- (1) the attorney intentionally failed to make the disclosure required by Rule 8a.2;  
or
  - (2) the attorney divided or agreed to divide a fee in violation of Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct.
- (b) *Unconscionable referral fee.* A referral fee is unconscionable within the meaning of Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct if it exceeds \$50,000 or 15% of the attorney fees for the party in the case, whichever is less. A lesser referral fee may also be determined to be unconscionable in the circumstances in which it is paid.
- (c) *Sanctions imposed.* If the court finds that grounds for imposing sanctions on an attorney exist, the court:
- (1) must disqualify the attorney from representing the party in the case unless disqualification would unfairly prejudice the party;
  - (2) may permit the party to void the party's agreement to retain the attorney;
  - (3) may order the forfeiture of all fees for the attorney in the case; and
  - (4) may impose other appropriate sanctions in addition.

**8a.5 Hearing.** The court must, on a party's motion, and may, on its own initiative, conduct an evidentiary hearing to determine whether there has been a violation of this rule.

## RULE 42. CLASS ACTIONS

**(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law; or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

~~———*Derivative Suit.* In a derivative suit brought pursuant to Article 5.14 of the Texas Business Corporation Act, the petition shall contain the allegations (1) that the plaintiff was a record or beneficial owner of shares, or of an interest in a voting trust for shares at the time of the transaction of which he complains, or his shares or interest thereafter devolved upon him by operation of law from a person who was the owner at that time, and (2) with particularity, the efforts of the plaintiff to have suit brought for the corporation by the board of directors, or the reasons for not making any such efforts. The derivative suit may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders similarly situated in enforcing the right of the corporation. The suit shall not be dismissed or compromised without the approval of the court, and notice in the manner directed by the court of the proposed dismissal or compromise shall be given to shareholders.~~

Comment to 2003 amendment: The second paragraph of subdivision (a) regarding derivative suits has been deleted because it is redundant of Article 5.14 of the Business Corporation Act, which sets forth detailed procedures for derivative suits.

**(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not

parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

~~(3) where the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or~~

~~(4) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include these issues include:~~

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the difficulties likely to be encountered in the management of a class action.

Comment to 2003 amendment: Subparagraph (b)(3) is omitted as unnecessary.

**(c) Determining by Order Whether to Certify a Class Action to Be Maintained; Notice and Membership in Class; Judgment, Actions Conducted Partially as Class Actions.**

(1) (A) ~~As soon as practicable after the commencement of an action brought as a class action, the court shall, after hearing, determine by order whether it is to be maintained. When a person sues or is sued as a representative of a class, the court must — at an early practicable time — determine by order whether to certify the action as a class action.~~



Comment to 2003 amendment: The requirement that certification be decided “at an early practicable time” is a change from the previous Texas rule 42 (c)(1) and federal rule 23 (c)(1) which required the trial court to decide the certification issue “as soon as practicable after the commencement of [the suit].” The amended language is not intended to permit undue delay or permit excessive discovery unrelated to certification, but is designed to encourage good practices in making certification decisions only after receiving the information necessary to decide whether certification should be granted or denied and how to define the class if certification is granted.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 42 (g).

(C) ~~This determination~~ An order under Rule 42 (c)(1) may be altered, or amended, or withdrawn at any time before final judgment. The court may order the naming of additional parties in order to insure the adequacy of representation.

(D) An order granting or denying certification under Rule 42(b)(3) must state:

(i) the elements of each claim or defense asserted in the pleadings;

(ii) any issues of law or fact common to the class members;

(iii) any issues of law or fact affecting only individual class members;

(iv) the issues that will be the object of most of the efforts of the litigants and the court;

(v) other available methods of adjudication that exist for the controversy;

(vi) why the issues common to the members of the class do or do not predominate over individual issues;

(vii) why a class action is or is not superior to other available methods for the fair and efficient adjudication of the controversy; and

(viii) if a class is certified, how the class claims and any issues affecting only individual members, raised by the claims or defenses asserted in the pleadings, will be tried in a manageable, time efficient manner.

(2) (A) For any class certified under Rule 42(b)(1) or (2), the court may direct appropriate notice to the class.

(B) After the court has determined that a class action may be maintained it shall order the party claiming the class action to For any class certified under Rule 42(b)(3), the court must direct to the class members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. In all class actions maintained under subdivisions (a)(1), (b)(2), and (b)(3), this notice shall advise the members of the class (A) the nature of the suit, (B) the binding effect of the judgment, whether favorable or not, and (C) the right of any member to appear before the court and challenge the court's determinations as to the class and its representatives. In all class actions maintained under subdivision (b)(4) this notice shall advise each member of the class. The notice must concisely and clearly state in plain, easily understood language:

(A)(i) the nature of the suit action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through counsel if the member so desires;

(v)(B) that the court will exclude him from the class any member who if he so requests by a specified date exclusion, stating when and how members may elect to be excluded; and

(vi)(C) that the judgment, whether favorable or not, will include and bind all members who do not request exclusion by the specified

~~date, and the binding effect of a class judgment on class members under Rule 42 (c) (3). (D) that any member who does not request exclusion may if he desires, enter an appearance through his counsel.~~

(3) The judgment in an action maintained as a class action under subdivisions (b)(1); or (b)(2), ~~and (b)(3)~~, whether or not favorable to the class, shall include; and describe; ~~and be binding upon all~~ those whom the court finds to be members of the class ~~and who received notice as provided in subdivision (c)(2)~~. The judgment in an action maintained as a class action under subdivision (b)(43), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

**(d) Actions Conducted Partially as Class Actions; Multiple Classes and Subclasses.**

When appropriate (1) an action may be brought or maintained as a class action with respect to particular issues, or (2) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

**(e) Settlement, Dismissal, or Compromise.** ~~A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.~~

(1) (A) The court must approve any settlement, dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) Notice of the material terms of the proposed settlement, dismissal or compromise, together with an explanation of when and how the members may elect to be excluded from the class, shall be given to all members in such manner as the court directs.

(C) The court may approve a settlement, dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, dismissal, or compromise under Rule 42(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 42(b)(3), the court may not approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4) (A) Any class member may object to a proposed settlement, dismissal, or compromise that requires court approval under Rule 42(e)(1)(A).

(B) An objection made under Rule 42(e)(4)(A) may be withdrawn only with the court's approval.

(f) **Discovery.** Unknown members of a class action are not to be considered as parties for purposes of discovery.

(g) **Class Counsel.**

(1) **Appointing Class Counsel.**

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action;
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action;
- counsel's knowledge of the applicable law; and

- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 42(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant or applicants best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 42(h) and (i).

**(h) Procedure for determining Attorney Fees Award.** In an action certified as a class action, the court may award attorney fees in accordance with subdivision (i) and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion, subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) **Hearing and Findings.** The court must hold a hearing in open court and must find the facts and state its conclusions of law on the motion. The court must state its findings and conclusions in writing or orally on the record.

**(i) Attorney's fees award.**

(1) In awarding attorney fees, the court must first determine a lodestar figure by multiplying the number of hours reasonably worked times a reasonable hourly rate. The attorney fees award must be in the range of 25% to 400% of the lodestar figure. In making these determinations, the court must consider the factors specified in Rule 1.04(b), TEX. DISCIPLINARY R. PROF. CONDUCT.

(2) If any portion of the benefits recovered for the class are in the form of coupons or other non-cash common benefits, the attorney fees awarded in the action must be in cash and non-cash amounts in the same proportion as the recovery for the class.

**(g)** **Effective date.** ~~This rule shall be effective only with respect to actions commenced on or after September 1, 1977.~~ Rule 42(i) applies only in actions filed after September 1, 2003.

## 167. OFFER OF SETTLEMENT; AWARD OF LITIGATION COSTS

**167.1 Generally.** Certain litigation costs may be awarded against a party who rejects an offer made substantially in accordance with this rule to settle a claim for monetary damages — including a counterclaim, cross claim, or third-party claim — except in:

- (a) a class action;
- (b) a shareholder's derivative action;
- (c) an action by or against the State, a unit of state government, or a political subdivision of the State;
- (d) an action brought under the Family Code;
- (e) an action to collect workers' compensation benefits under title 5, subtitle A of the Labor Code; or
- (f) an action filed in a justice of the peace court or small claims court.

### 167.2 Settlement Offer.

- (a) *Defendant's declaration a prerequisite; deadline.* A settlement offer under this rule may not be made until a defendant — a party against whom a claim for monetary damages is made — files a declaration invoking this rule. When a defendant files such a declaration, an offer or offers may be made under this rule to settle only those claims by and against that defendant. The declaration must be filed no later than 45 days before the case is set for conventional trial on the merits.
- (b) *Requirements of an offer.* A settlement offer must:
  - (1) be in writing;
  - (2) state that it is made under Rule 167 and Chapter 42 of the Texas Civil Practice and Remedies Code;

- (3) identify the party or parties making the offer and the party or parties to whom the offer is made;
  - (4) state the terms by which all monetary claims — including any attorney fees, interest, and costs that would be recoverable up to the time of the offer — between the offeror or offerors on the one hand and the offeree or offerees on the other may be settled;
  - (5) state a deadline — no sooner than 14 days after the offer is served — by which the offer must be accepted;
  - (6) be served on all parties to whom the offer is made.
- (c) *Conditions of offer.* An offer may be made subject to reasonable conditions, including the execution of appropriate releases, indemnities, and other documents. An offeree may object to a condition by written notice served on the offeror before the deadline stated in the offer. A condition to which no such objection is made is presumed to have been reasonable. Rejection of an offer made subject to a condition determined by the trial court to have been unreasonable cannot be the basis for an award of litigation costs under this rule.
- (d) *Non-monetary and excepted claims not included.* An offer must not include non-monetary claims and other claims to which this rule does not apply.
- (e) *Time limitations.* An offer may not be made:
- (1) before a defendant's declaration is filed;
  - (2) within 60 days after the appearance in the case of the offeror or offeree, whichever is later;
  - (3) within 14 days before the date the case is set for a conventional trial on the merits except that an offer may be made within that period if it is in response to, and within seven days of, a prior offer.
- (f) *Successive offers.* A party may make an offer after having made or rejected a prior offer. A rejection of an offer is subject to imposition of litigation costs under this rule only if the offer is more favorable to the offeree than any prior offer.



### 167.3 Withdrawal, Acceptance, and Rejection of Offer.

- (a) *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. Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for awarding litigation costs under this rule.
- (b) *Acceptance of offer.* An offer that has not been withdrawn can be accepted only by written notice served on the offeror by the deadline stated in the offer. When an offer is accepted, the offeror or offeree may file the offer and acceptance and may move the court to enforce the settlement.
- (c) *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 deadline stated in the offer.
- (d) *Objection to offer made before an offeror's joinder or designation of responsible third party.* An offer made before an offeror joins another party or designates a responsible third party may not be the basis for awarding litigation costs under this rule against an offeree who files an objection to the offer within 15 days after service of the offeror's pleading or designation.

### 167.4 Awarding Litigation Costs.

- (a) *Generally.* If a settlement offer made under this rule is rejected, and the judgment to be awarded on the monetary claims covered by the offer is significantly less favorable to the offeree than was the offer, the court must award the offeror litigation costs against the offeree from the time the offer was rejected to the time of judgment.
- (b) *"Significantly less favorable" defined.* A judgment award on monetary claims is significantly less favorable than an offer to settle those claims if:
  - (1) the offeree is a claimant and the judgment would be less than 80 percent of the offer; or
  - (2) the offeree is a defendant and the judgment would be more than 120 percent of the offer.

- (c) *Litigation costs.* Litigation costs are the expenditures actually made and the obligations actually incurred — directly in relation to the claims covered by a settlement offer under this rule — for the following:
  - (1) court costs;
  - (2) reasonable fees for not more than two testifying expert witnesses; and
  - (3) reasonable attorney fees.
- (d) *Limits on litigation costs.* The litigation costs that may be awarded under this rule must not exceed the following amount:
  - (1) the sum of the noneconomic damages, the exemplary or additional damages, and one-half of the economic damages to be awarded to the claimant in the judgment; minus
  - (2) the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim.
- (e) *No double recovery permitted.* A party who is entitled to recover attorney fees and costs under another law may not recover those same attorney fees and costs as litigation costs under this rule.
- (f) *Limitation on attorney fees and costs recovered by a party against whom litigation costs are awarded.* A party against whom litigation costs are awarded may not recover attorney fees and costs under another law incurred after the date the party rejected the settlement offer made the basis of the award.
- (g) *Litigation costs to be awarded to defendant as a setoff.* Litigation costs awarded to a defendant must be made a setoff to the claimant's judgment against the defendant.

#### **167.5 Procedures.**

- (a) *Modification of time limits.* On motion, and for good cause shown, the court may — by written order made before commencement of trial on the merits — modify the time limits for filing a declaration under Rule 167.2(a) or for making an offer.

- (b) *Discovery permitted.* On motion, and for good cause shown, a party against whom litigation costs are to be awarded may conduct discovery to ascertain the reasonableness of the costs requested. If the court determines the costs to be reasonable, it must order the party requesting discovery to pay all attorney fees and expenses incurred by other parties in responding to such discovery.
- (c) *Hearing required.* The court must, upon request, conduct a hearing on a request for an award of litigation costs, at which the affected parties may present evidence.

**167.6 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 litigation costs. The provisions of this rule may not be made known to the jury by any means.

**167.7 Other Settlement Offers Not Affected.** This rule does not apply to any offer made in a mediation or arbitration proceeding. A settlement offer not made under this rule, or made in an action to which this rule does not apply, cannot be the basis for awarding litigation costs under this rule. This rule does not limit or affect a party's right to make a settlement offer that does not comply with this rule, or in an action to which this rule does not apply.