

**PROPOSED RULE 166b**

**1. Definitions.**

- (a.) “Claim” means a claim to recover monetary damages or for other relief, and includes a counterclaim, cross-claim, or third-party claim.
- (b.) “Claimant” means a person making a claim.
- (c.) “Defendant” means a person from whom a claimant seeks recovery of damages or other relief on a claim, including a counterdefendant, cross-defendant, or third-party defendant.
- (d.) “Litigation costs” means costs actually incurred that are directly related to preparing an action for trial and actual trial expenses which are incurred after the date of the rejected offer to settle which is used to measure an award under Section 9 of this rule, including:
  - (1) attorneys’ fees, including fees earned pursuant to a valid contingency fee contract;
  - (2) costs of court;
  - (3) reasonable deposition costs; and
  - (4) reasonable fees for necessary testifying expert witnesses.
- (e.) “Offer to settle” means an offer to settle or compromise a claim made in compliance with Section 5.

**2. Applicability and Effect.**

- (a.) This rule does not apply to:
  - (1) a class action;
  - (2) an action brought under the Deceptive Trade Practices-Consumer Protection Act (Sections 17.41 et seq., Business & Commerce Code);
  - (3) an action brought under the Family Code; or
  - (4) an action to collect workers’ compensation benefits under Subtitle A, Title 5, Labor Code.
- (b.) This rule does not limit or affect the ability of any person to make an offer to settle or compromise a claim that does not comply with this rule. A party’s offer to settle or compromise that does not comply with subsection 5 of this rule does not entitle the party to recover litigation costs under this rule.

**3. Election By Governmental Units; Waiver.**

- (a.) This rule does not apply to an action by or against the state, any unit of state government, or any political subdivision of the state unless the governmental unit expressly elects both to seek recovery of litigation costs under this rule and to waive immunity from liability for litigation costs awarded under this rule.
- (b.) To be effective as an election and waiver, the governmental unit must make the election and waiver specifically and affirmatively by a writing filed with the court within 45 days of the filing of the governmental unit’s original petition or original answer.
- (c.) An election and waiver is effective only in the action in which it is filed, even if the action is subsequently joined or consolidated with another action.

**4. Service.** When this rule requires a writing to be served on another party, service is adequate if it is performed in a manner described in Rules 4, 5 and 21a, Texas Rules of Civil Procedure.

**5. Offer To Settle.**

(a.) A party may serve on an opposing party an offer to settle all the claims in the action between that party and the opposing party.

(b.) The offer to settle:

- (1) must be in writing;
- (2) must state that it is an offer to settle all claims pursuant to this section;
- (3) must specify the terms by which the claims may be settled;
- (4) must specify a deadline by which the offer must be accepted;
- (5) may not include a demand for litigation costs except for costs of court;
- (6) must offer to allow a judgment to be entered consistent with the terms

of the offer; and

(7) must be served on the party to whom the offer is made.

(c.) A party may not make an offer to settle under this section after the tenth day before the date set for trial, except that a party may make an offer to settle that is a counteroffer on or before the seventh day before the date set for trial.

(d.) The parties are not required to file with the court an offer to settle.

(e.) A party may only make an offer to settle under this rule during the course of the litigation but may make successive offers to settle.

**6. Acceptance of Offer.**

(a.) A party may accept an offer to settle on or before 5:00 p.m. on the 14<sup>th</sup> day after the date the party received the offer to settle or before the deadline specified in the offer, whichever is later.

(b.) Acceptance of an offer must be:

- (1) in writing; and
- (2) served on the party who made the offer.

(c.) Upon acceptance of an offer to settle, either party may file the offer and notice of acceptance together with proof of service thereof, and thereupon the court shall enter judgment in accordance with the offer and acceptance except that the Court may not seal any judgment without first complying with Rule 76a, T.R.C.P..

**7. Withdrawing an Offer**

(a.) A party may withdraw an offer to settle by a writing served on the party to whom the offer was made before the party accepts the offer. A party may not accept an offer to settle after it is withdrawn. A party may not withdraw an offer to settle after it has been accepted.

(b.) If a party withdraws an offer to settle, that offer does not entitle the party to recover litigation costs.

**8. Rejection of Offer.** For purposes of this rule, an offer to settle a claim is rejected if:

(a.) the party to whom the offer was made rejects the offer by a writing served on the party making the offer; or

(b.) the offer is not withdrawn and is not accepted before the deadline for accepting the offer.

**9. Award of Litigation Costs.**

(a.) A party who made an offer to settle the claims between that party and the party to whom the offer was made may recover litigation costs provided:

- (1) the offer to settle was rejected;
- (2) the court entered a judgment on the claims and;
- (3) if a party sought monetary damages.
  - (A) the amount of monetary damages awarded on the claims in the judgment is more favorable to the party who made the offer than the offer to settle the claims; and
  - (B) the difference between the amount of monetary damages awarded on the claims in the judgment and the amount of the offer to settle the claims is equal to or greater than twenty-five percent of the amount of the offer to settle the claims; or
- (4) if a party sought nonmonetary relief, the judgment is more favorable to the party who made the offer to settle the claims.

(b.) Each element of litigation costs awarded under this rule must be both reasonable and necessary to the prosecution or defense of the action.

(c.) The court will determine the amount of “Litigation Costs” under this rule and may reduce, but not enlarge, the amount as justice requires.

(d.) The amount of litigation costs awarded against the claimant may not exceed the amount of the damages received by the claimant in the action.

**10. Attorney’s Fees.**

(a.) A party may not recover attorneys’ fees as litigation costs under this rule unless the party was represented by an attorney.

(b.) If Litigation Costs are contested, the court may award additional Litigations Costs for the reasonable and necessary amount expended to pursue or dispute the claimed Litigation Costs.

**11. Evidence Not Admissible.**

(a.) Evidence relating to offers to settle is not admissible except in an action to enforce the settlement or in a proceeding to obtain litigation costs under this rule.

(b.) Except in an action or proceeding described in Subsection 11(a), the provisions of this rule may not be made known to the jury through any means, including voir dire, introduction into evidence, instruction, or argument.