



The Advocates' Society La Société des plaideurs

June 30, 2023

VIA EMAIL

The Honourable Julie Thorburn
Justice of the Court of Appeal for Ontario &
Chair of the Partial Settlement Subcommittee of the Civil Rules Committee
130 Queen Street West
Toronto, Ontario M5H 2N5

Dear Justice Thorburn:

RE: Draft Rule Regarding Obligation of Disclosure of Partial Settlement Agreements

Thank you for inviting The Advocates' Society to provide feedback to the Partial Settlement Subcommittee regarding the development of a rule requiring the disclosure of partial settlement agreements. We were very pleased to send our representative, Darryl Cruz, to the stakeholder meeting held by the Partial Settlement Subcommittee on May 23, 2023, and to receive the draft rule prepared by the Subcommittee in the wake of that meeting.

Established in 1963, The Advocates' Society is a not-for-profit organization representing approximately 5,500 diverse lawyers and students across the country, including approximately 4,500 in Ontario—unified in their calling as advocates. As the leading national association of litigation counsel in Canada, The Advocates' Society and its members are dedicated to promoting a fair and accessible system of justice, excellence in advocacy, and a strong, independent, and courageous bar. A core part of our mission is to provide policymakers with the views of legal advocates on matters that affect access to justice, the administration of justice, the independence of the bar and the judiciary, the practice of law by advocates, and equity, diversity, inclusion, and reconciliation with Indigenous peoples in the justice system and legal profession.

In our submission below, we provide our responses to the consultation questions posed in your letter dated May 2, 2023. We have reproduced the questions, for your convenient reference. We then set out our comments on the proposed rule.

I. Stakeholder Consultation Questions

1. What does “changing the litigation landscape” mean? What are the triggering events?

The Advocates' Society is of the view that there are two conditions for a partial settlement to change the 'litigation landscape' such that there should be an obligation to disclose that change to other parties: (1) a finalized settlement agreement; and (2) the settlement agreement has changed the formal adversity created by the pleadings.

Requiring the disclosure of settlement offers or settlement agreements that are not yet final and enforceable would overshoot the mark and ultimately discourage parties from engaging in settlement discussions.

Settlement agreements should only need to be disclosed to the other parties and the court if they have altered the formal *lis* between the parties, such that the parties' original, pleaded positions no longer reflect the reality of the lines of adversity in the case before the court.

2. *What parts of the settlement agreement have to be disclosed?*

The Advocates' Society's position is that only the terms of the settlement agreement that relate to the change in formal adversity between the parties need to be disclosed. Consideration given by one side or the other that does not relate to the litigation process itself does not need to be disclosed.

A requirement to disclose all the terms of the settlement agreement except for the quantum will act as a disincentive to settle in some cases. There can be many terms in a settlement agreement that do not affect the other parties to the litigation or the conduct of the litigation process (but which nonetheless constitute sensitive information that the settling parties would not want disclosed, for example, the payment of outstanding invoices or a covenant not to sue in an unrelated matter).

3. *What does "immediate disclosure" mean and should there be residual discretion?*

The Advocates' Society believes that what constitutes "immediate disclosure" is specific to the context of the litigation. The agreement should be disclosed as soon as reasonably possible in the context of the litigation, with a view to ensuring that no party takes a step in the litigation after the agreement is reached but before it is disclosed.

4. *How does one notify the court? (Motion for directions? If so how soon?)*

The Advocates' Society strongly agrees that the court must understand the nature of the relationships between the parties in order to fairly adjudicate a matter. However, it is not clear to The Advocates' Society that a free-standing obligation for the parties to notify *the court* after a partial settlement is reached is necessary, on top of an obligation to disclose the settlement to the other parties.

If the settlement is reached early on in the process and there is no judge assigned to the matter and no pending court date, then the information provided to the court would not be of any use and would simply form part of the court file. If the matter is before the court on a regular or upcoming basis, the court ought to be advised; however, in most cases, a motion for directions is unnecessary and would unnecessarily tax court resources. The parties may write to the court to advise that a partial settlement agreement has been reached.

5. *What is the effect of lack of prejudice/bad faith/inadvertence/delay in disclosure?*

The Advocates' Society believes that a lack of prejudice, bad faith, or delay in disclosure of a partial settlement agreement should go to the remedy crafted by the court for failure to disclose in accordance with the rules (see response to question 6, below).

6. *Should the only remedy for failure to disclose in accordance with the rules be a stay of proceedings or should there be room for other types of relief?*

The Advocates' Society believes that there must be other remedies and relief available short of a stay of proceedings to do justice in cases where a partial settlement agreement is not disclosed or is disclosed late. The remedy should be proportionate and responsive to the prejudice suffered.

7. *Should there be a rule, and if so, what discretion should be afforded to the court?*

The Advocates' Society strongly agrees that there should be a rule regarding the requirement to disclose partial settlement agreements. Clarity in the law and in counsel's responsibilities are required as to: (1) which partial settlements need to be disclosed; (2) what elements of the settlement agreement need to be disclosed; and (3) when it needs to be disclosed. Legislative reform is also required to ensure that remedies short of a stay are available to the court should counsel fail to comply with their obligations regarding the disclosure of partial settlement agreements.

II. Comments on the Draft Rule

The Advocates' Society's comments on the draft rule reflect our views on the discussion questions outlined above.

Clause 1

Clause 1(c) defines "partial settlement agreement" as "a settlement agreement reached by one or more claimants, against one or more defendants or respondents to a claim, where either the claim will continue against the non-settling parties only, or against both the settling and non-settling parties."

In The Advocates' Society's view, this definition is too broad. The definition would capture settlement agreements that do not change the litigation landscape or affect the other parties' conduct of the litigation. We recommend that the definition include a standard that the settlement agreement must meet in order for its disclosure to be required. As per our comments above, our recommended standard is that the settlement agreement has changed the formal adversity created by the pleadings.

Clause 2

Clause 2 requires a claimant to disclose "all terms of the partial settlement agreement except the amount" to non-settling parties. As noted above, The Advocates' Society believes that an expansive requirement to disclose all the terms of the agreement will discourage parties from settling in multi-party litigation. Settlements can be nuanced and can involve highly sensitive information. A requirement to disclose every term of the settlement except the quantum will encompass many terms that are unrelated to the claimant's ability to prosecute their claims against non-settling parties, or to the remaining defendants' ability to defend the claims. The Advocates' Society suggests that only the terms of the settlement agreement that relate to the change in formal adversity between the parties should be required to be disclosed by the rule. Consideration given or received that does not relate to the litigation process should not be required to be disclosed.

Clause 2 further requires that the agreement be disclosed seven days after the agreement is reached, or before any further step is taken in the proceeding, whichever occurs earlier. The Advocates' Society believes that the seven-day period may be too brief in some cases, as, for example, a lawyer would risk prejudicing their client should a party accept a settlement offer when counsel is on vacation or involved in a trial. We recommend that a longer period be chosen. We further recommend that the longer period chosen be mirrored in the clause 4 requirement to notify the court "at least seven days before the first court appearance after the partial settlement agreement is reached" (see clause 4, below).

Clause 4

Clause 4 requires the claimant to file with the court a form containing "all terms of the settlement agreement except the amount". As explained above with respect to clause 2, The Advocates' Society is concerned about the breadth of the requirement to disclose the terms of the settlement agreement to other parties and we reiterate those comments in relation to clause 4.

We are further concerned that the filed court form will be available to the public as part of the court file. While The Advocates' Society agrees the relevant terms of the settlement must be disclosed to the other parties and to the court to ensure a fair litigation process, the public should not be entitled to the same information about the settlement agreement. This requirement would act as a disincentive to settle. We recommend providing for the confidentiality of this form in the rule.

Clause 5

Clause 5 sets out the remedies available to the court for failure to comply with the obligation to disclose a partial settlement agreement, including the basket clause in clause 5(d) ("make any other order as is just"). The Advocates' Society strongly supports this wider array of available remedies, which in our view will allow the court to make orders that are fair and proportionate in the particular circumstances of each case, without needing to always resort to the 'nuclear option' of staying the entire proceeding.

With respect to the remedy in clause 5(c) ("stay the proceeding"), The Advocates' Society queries whether broader language is required to account for the fact that the rule applies to actions, counterclaims, crossclaims, third or subsequent party claims and applications, as per clause 1(b). We suggest this remedy may need to be rephrased as the court may "strike or stay all or part of a claimant's claim", to ensure all possible scenarios in multi-party litigation are covered.

We further suggest adding to the list of possible remedies that the court may:

- order the disclosure or production for inspection of a document or documents from the settling parties;
- strike out all or part of a person's evidence, including any affidavit made by a person, or any document filed by a party; and
- order an adjournment.

Clause 6

Clause 6 provides that "This rule does not apply to partial settlement agreements that are subject to court approval under a statute," which we understand would include infant settlements under Rule 7.08 of the *Rules of Civil Procedure* and settlements of class proceedings under section 27.1 of the *Class Proceedings Act, 1992*.

The Advocates' Society believes that the rule requiring the disclosure of partial settlement agreements should apply to settlements that require court approval. If a partial settlement changes the formal adversity created by the pleadings, other parties should be advised so they can make choices in the litigation accordingly. In addition, we are concerned that the current common law would apply to the disclosure of partial settlements in cases excluded from the rule, including the draconian remedy of a stay of proceedings for failure to disclose a partial settlement agreement immediately, which is not a desirable outcome.

The Advocates' Society sincerely appreciates the opportunity to provide our input on this important issue. We would be pleased to answer any questions you may have about our recommendations.

Yours sincerely,



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President

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Vicki White, Chief Executive Officer, The Advocates' Society

The Advocates Society's Task Force on Partial Settlement

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