



Rule for the Disclosure of Partial Settlements

Submitted to: Partial Settlement Subcommittee of
the Civil Rules Committee

Submitted by: Ontario Bar Association

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Executive Summary of Recommendations

The Ontario Bar Association (“**OBA**”) appreciates the opportunity to provide comments to the Partial Settlement Subcommittee (“**Subcommittee**”) of the Civil Rules Committee (“**Committee**”) on a new draft Rule to address the disclosure of partial settlements.

The OBA is supportive of an amendment to the *Rules of Civil Procedure*, which provides for a Rule to address the disclosure of partial settlements. The OBA agrees that a Rule will provide clarity and respond to concerns relating to the effect of the existing jurisprudence in this area. During the consultation process on the issue of disclosure of partial settlements, OBA members agreed that a failure to disclose a partial settlement is often prejudicial. However, members also agreed that a presumptive stay is an extraordinary remedy, and that more flexibility is required to address non-compliance.

The Ontario Bar Association (OBA)

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. We provide updates and education on every area of the law to combined audiences of 20,000 lawyers annually. Each year, through the work of our 40 practice sections, which include leading experts in their field, the OBA provides advice to legislators and other key decision-makers to ensure the justice sector works effectively and efficiently to support access to high-quality justice for Ontarians.

This submission has been prepared on behalf of the OBA’s Civil Litigation, Insurance Law, Employment Law, and Class Actions Sections, which includes lawyers who practice in every region of Ontario. Members of these sections represent a wide range of clients and have significant expertise and experience with the civil justice system.




Proposed Draft Rule

The Subcommittee has drafted proposed language for a potential Rule. The draft is not final and will be subject to any changes elicited through the feedback process, approved by the Subcommittee and the Committee, as well as drafting by legislative counsel.

Obligation of Disclosure of Partial Settlement Agreements

1. In this rule,
 - a. “claimant” includes plaintiffs and applicants;
 - b. “claim” includes actions, counterclaims, crossclaims, third or subsequent party claims, and applications;
 - c. “partial settlement agreement” means 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.
2. At any stage of the proceeding, a claimant is required to disclose to all non-settling parties all terms of the partial settlement agreement except the amount, whether or not the partial settlement agreement has been reduced to writing,
 - a. seven days after the agreement is reached; or
 - b. before any further step is taken in the proceeding, whichever occurs earlier.
3. This rule must be complied with notwithstanding any confidentiality or non-disclosure agreement between the settling parties.

Notice to Court

4. A claimant is required to serve on all parties to the claim and file with the court, in Form , with proof of service, all terms of the settlement agreement except the amount, at least seven days before the first court appearance after the partial settlement agreement is reached.

Remedy for Failure to Disclose

5. Where a claimant fails to comply with this rule, the court may:
 - a. order costs regardless of the outcome of the proceeding;
 - b. order further examinations for discovery to be conducted at the claimant’s expense;
 - c. stay the proceeding; and/or
 - d. make any other order as is just.
6. This rule does not apply to partial settlement agreements that are subject to court approval under a statute.



Comments & Recommendations

Draft Wording

Proposed Rule 1(a)

The definition of “claimant” may need to be more specifically defined to clarify whether the application of the Rule is intended to include defendants in circumstances of crossclaims. OBA members indicated that in some circumstances, a partial settlement may exist between defendants only and that the failure to identify a “defendant” in the definition of “claimant” may be interpreted as operating to negate the application of the proposed rule. The OBA believes that the proposed Rule should apply to parties to a partial settlement regardless of whether they are a plaintiff or defendant. One approach could be to replace the definition of “claimant” with “party to a partial settlement agreement” throughout the proposed rule. However, some OBA members did note that agreements between defendants may be the type of strategic agreements which would be subject to common interest privilege in defending the plaintiff’s claim and may therefore not wish to be disclosed. Therefore, matters that are the subject of common interest privilege may be expressly excluded from disclosure.

Regarding paragraph 1(b), the OBA queries whether it is necessary to expand this Rule to applications in light of the comments received from judicial officers at the committee meeting.

Proposed Rule 2

The OBA suggests using the term “must” or “shall” rather than “is required to” for consistency with other language in the *Rules of Civil Procedure*. Further, the clarification that a partial settlement “whether or not it has been reduced to writing” may be moved to the definition of a “partial settlement agreement” from paragraph 2. The clarification of “whether or not it has been reduced to writing” can be further clarified to read: “whether or not reduced to a



formal written agreement” as the intention of this proviso appears to be to capture all partial settlement agreements that are properly formed with an offer and acceptance on the key terms as opposed to such agreements once formalized into signed minutes of settlement or a formal agreement.

Proposed Rule 4

OBA members agreed that immediate notice to the parties should be provided and are supportive of a seven (7) day notice requirement. The term “deliver” may be used in lieu of service and filing considering the definition of deliver provided for in Rule 1.03.

Proposed Rule 6

Some OBA members expressed uncertainty as to whether this language would include settlements which require court approval pursuant to Rule 7 of the *Rules of Civil Procedure*. The OBA suggests that, to the extent that the intent of this paragraph is to exempt certain proceedings (such as class proceedings), that the language used should be more specific as to the exemptions. For example, “this rule does not apply to proceedings governed by the *Class Proceedings Act, 1992*.”

Application of Rule

OBA members expressed concern over potential litigation on the application of the proposed Rule amendment retroactively. In order to avoid this uncertainty, the OBA supports the proposed amendment to apply retroactively considering the concerns relating to the existing jurisprudence in this area. This can be achieved with an additional sub-Rule expressly stating: “This Rule shall apply to a partial settlement agreement regardless of whether or not it was reached before this Rule came into force.”



Conclusion

The OBA appreciates the opportunity to provide this submission in response to the Partial Settlement Subcommittee's consultation on a new draft Rule to address the disclosure of partial settlements. We also appreciate the collaborative approach the Subcommittee has taken with stakeholder engagement, and we would welcome the opportunity to arrange a meeting to discuss any of our comments if that would be helpful.